TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 593

FRANCES PERKINS, INDIVIDUALLY AND AS SECRETARY OF LABOR OF THE UNITED STATES, ET AL., PETITIONERS

vs.

LUKENS STEEL COMPANY, ALAN WOOD STEEL COMPANY, SOUTH CHESTER TUBE COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED DECEMBER 16, 1939
CERTIORARI GRANTED FEBRUARY 5, 1940

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United States Court of Appeals for the District of Columbia

JANUARY TERM, 1939.

No. 7368

LUKENS STEEL COMPANY, A CORPORATION, ALAN WOOD STEEL COMPANY, A CORPORATION, SOUTH CHESTER TUBE COMPANY, A CORPORATION, CENTRAL IRON & STEEL COMPANY, A CORPORATION, HARRISBURG STEEL CORPORATION, A CORPORATION, THE EASTERN ROLLING MILL COMPANY, A CORPORATION, AND THE ATLANTIC WIRE COMPANY, A CORPORATION, APPELLANTS,

vs.

FRANCES PERKINS, INDIVIDUALLY AND AS SECRETARY OF LABOR OF THE UNITED STATES, CHARLES V. McLAUGHLIN, INDIVIDUALLY AND AS ASSISTANT SECRETARY OF LABOR OF THE UNITED STATES, L. METCALFE WALLING, INDIVIDUALLY AND AS ADMINISTRATOR OF THE DIVISION OF PUBLIC CONTRACTS OF THE DEPARTMENT OF LABOR OF THE UNITED STATES, HENRY MORGENTHAU, JR., INDIVIDUALLY AND AS SECRETARY OF THE TREASURY OF THE UNITED STATES, CHRISTIAN JOY PEOPLES, INDIVIDUALLY AND AS DIRECTOR OF THE PROCUREMENT DIVISION OF THE DEPARTMENT OF THE TREASURY OF THE UNITED STATES, CLAUDE AUGUSTUS SWANSON, INDIVIDUALLY AND AS SECRETARY OF THE NAVY OF THE UNITED STATES, HARRY HINES WOODRING, INDIVIDUALLY AND AS SECRETARY OF WAR OF THE UNITED STATES, HAROLD L. ICKES, INDIVIDUALLY AND AS SECRETARY OF THE INTERIOR OF THE UNITED STATES, AND JAMES A. FARLEY, INDIVIDUALLY AND AS POSTMASTER GENERAL OF THE UNITED STATES, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA.

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United States Court of Appeals for the District of Columbia

A. District Court of the United States
For the District of Columbia.

Civil Action File No. 1839

LUKENS STEEL COMPANY, a corporation, ALAN WOOD STEEL COMPANY, a corporation, SOUTH CHESTER TUBE COMPANY, a corporation, et al., *Plaintiffs*,

—against—

FRANCES PERKINS, individually and as Secretary of Labor of the United States, CHARLES V. MCLAUGHLIN, individually and as Assistant Secretary of Labor of the United States, L. METCALFE WALLING, individually and as Administrator of the Division of Public Contracts of the Department of Labor of the United States, et al., *Defendants*.

UNITED STATES OF AMERICA,
District of Columbia, ss:

BE IT REMEMBERED, that in the District Court of the United States for the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 In the District Court of the United States
For the District of Columbia.

Civil Action File No. 1839

LUKENS STEEL COMPANY, a corporation (street post office address: Coatesville, Pennsylvania), ALAN WOOD STEEL COMPANY, a corporation (street post office address: Conshohocken, Pennsylvania), SOUTH CHESTER TUBE COMPANY, a corporation (street post office address: Chester, Pennsylvania), CENTRAL IRON & STEEL COMPANY, a corporation (street post office address: Harrisburg, Pennsylvania), HARRISBURG STEEL CORPORATION, a corporation (street post office address: Harrisburg, Pennsylvania), THE EASTERN ROLLING MILL COMPANY, a corporation (street post office address: Colgate, Maryland), and THE ATLANTIC WIRE COMPANY, a corporation (street post office address: Branford, Connecticut), *Plaintiffs*,

—against—

FRANCES PERKINS, individually and as Secretary of Labor of the United States, CHARLES V. McLAUGHLIN, individually and as Assistant Secretary of Labor of the United States, L. METCALFE WALLING, individually and as Administrator of the Division of Public Contracts of the Department of Labor of the United States, HENRY MORGENTHAU, JR., individually and as Secretary of the Treasury of the United States, CHRISTIAN JOY PEOPLES, individually and as Director of the Procurement Division of the Department of the Treasury of the United States, CLAUDE AUGUSTUS SWANSON, individually and as Secretary of the Navy of the United States, HARRY HINES WOODRING, individually and as Secretary of War of the United States, HAROLD L. ICKES, individually and as Secretary of the Interior of the United States, and JAMES A. FARLEY, individually and as Postmaster General of the United States, *Defendants.*

Filed February 25, 1939

Complaint for Injunction and Declaratory Judgment.

To the Honorable, the Judges of the District Court of the United States for the District of Columbia:

The plaintiffs above named respectfully represent to the Court as follows:

1. This action is a civil action of which this Court has jurisdiction by virtue of the provisions of Sections 41 and 44 of Title 18 of The Code of the District of Columbia, as hereinafter more fully appears. The defendants are residents of or found within the District of Columbia.

2. The action arises, as hereinafter more fully appears, under the Act of Congress approved June 30, 1936 (Public —No. 846—74th Congress; 49 Stat. 2036-2039, c. 881; United States Code, Supplement IV, Title 41, Secs. 35-45), which Act is hereinafter referred to either as the Public Contracts Act or as the Act. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000. This Court has jurisdiction thereof pursuant to the provisions of Section 43 of Title 18 of The Code of the District of Columbia.

2 3. Plaintiff Lukens Steel Company (hereinafter sometimes referred to as Lukens) is a corporation incorporated under the laws of the Commonwealth of Pennsylvania and engaged in the production and sale of certain products of the iron and steel industry. It owns and operates at Coatesville, which is in the County of Chester in said Commonwealth and is approximately 38 miles from Philadelphia Pennsylvania, and approximately 312 miles from Pittsburgh, Pennsylvania, a plant which has an annual capacity of 350,000 tons of sheared plates, 85,000 tons of universal plates and 25,000 tons of rolled blooms and billets for forging purposes. The principal products manufactured and sold by Lukens are sheared plates, universal plates and flanged and dished heads.

At its above-mentioned plant Lukens employs at the present time approximately 2,000 wage earners, of whom approximately 125 are common laborers. Such common laborers are paid at the rate of 56½ cents an hour. Substantially all the other wage owners employed by Lukens at

such plant are paid at rates of pay in excess of such rate of pay for common labor.

Lukens is a party to an agreement with the Steel Workers Organizing Committee by and under which a minimum basic hourly earning of 56½ cents is prescribed and paid.

The common labor wage rate paid by Lukens as aforesaid is the same as that paid by the only other iron and steel company located in Coatesville. Such common labor wage rate is equal to or higher than that paid by all other industries located in Coatesville.

Lukens has sold iron and steel products to various agencies of the United States for many years and desires to continue to bid on contracts of agencies of the United States for such products in the future. The amounts of the gross sales by Lukens of iron and steel products to agencies of the United States during the years 1937 and 1938 are $107,750 and $277,749, respectively. The agencies of the United States to which Lukens sold iron and steel products in such years were the Department of the Navy, including the Bureau of Supplies and Accounts and various navy yards, and the Department of War. The principal products which were sold to such agencies during such years were plates.

Lukens presently is a party to four contracts made with the Department of the Navy, the performance of which has not been completed. The sales price of the iron and steel products to be furnished under such contracts is approximately $100,000.

4. Plaintiff Alan Wood Steel Company (hereinafter sometimes referred to as Alan Wood) is a corporation incorporated under the laws of the Commonwealth of Pennsylvania and engaged in the production and sale of certain products of the iron and steel industry. It owns and operates a plant at Ivy Rock, in the County of Montgomery in said Commonwealth, which has an annual capacity of 660,000 tons of steel ingots, 130,000 tons of sheared plates and 234,100 tons of rolled blooms and billets; a plant at Conshohocken, in said County, which has an annual capacity of 108,000 tons of hot and cold rolled sheets; and a plant at Swedeland, in said County, which has an annual capacity of 406,080 tons of pig iron. All said plants are located ap-

proximately 15 miles from Philadelphia, Pennsylvania, and approximately 340 miles from Pittsburgh, Pennsylvania.

At its above-mentioned plants Alan Wood employs
3 at the present time approximately 1,500 wage earners, of whom approximately 225 are common laborers. Such common laborers are paid at the rate of 56½ cents an hour, which is the base rate of pay of Alan Wood for common labor. Substantially all the other wage earners employed by Alan Wood at such plants are paid at rates of pay in excess of such base rates of pay for common labor, which rates are, in most instances, computed by adding various differentials to such base rate.

Alan Wood is a party to an agreement with the Steel Workers Organizing Committee and said base rate of pay for common labor of 56½ cents an hour is paid pursuant to said agreement.

Alan Wood has sold iron and steel products to various agencies of the United States for many years and desires to continue to bid on contracts of agencies of the United States for such products in the future. The amounts of the gross sales by Alan Wood of iron and steel products to agencies of the United States during the years 1937 and 1938 are approximately $134,000 and $185,400, respectively. The agencies of the United States to which Alan Wood sold iron and steel products in such years included the Departments of the Navy, War and Interior, and the principal products which were sold to such agencies were steel sheets and plates.

Alan Wood has on its books unfilled orders under contracts made with and purchase orders from the Department of the Navy and the Department of War for iron and steel products, the aggregate sales price of which is approximately $200,000.

5. Plaintiff South Chester Tube Company (hereinafter sometimes referred to as South Chester) is a corporation incorporated under the laws of the Commonwealth of Pennsylvania and engaged in the production and sale of certain products of the iron and steel industry. It owns and operates at Chester, which is in the County of Delaware in said Commonwealth and is approximately 15 miles southwest of Philadelphia, a plant which has an annual capacity of 85,000 tons of wrought iron and steel pipe.

At its above-mentioned plant South Chester employs at the present time approximately 560 productive workers, of whom approximately 100 are common laborers. Such common laborers are paid at the rate of 56½ cents an hour, which is the base rate of pay of South Chester for common labor. All the other wage earners employed by South Chester at such plant are paid at rates of pay in excess of such base rate of pay for common labor.

The common labor base rate of 56½ cents an hour paid by South Chester as aforesaid is paid pursuant to a contract with Amalgamated Association of Iron, Steel, and Tin Workers of North America, Lodge No. 184.

Said common labor base rate is higher than the minimum wage rate for common labor paid by more than two-thirds of the 25 leading industrial, utility and railroad concerns operating in the City of Chester, Pennsylvania.

During the years 1937 and 1938, South Chester sold pipe to, among others, the Department of the Navy. South Chester desires to continue to bid on contracts of agencies of the United States for products manufactured by it.

6. Plaintiff Central Iron & Steel Company (hereinafter sometimes referred to as Central) is a corporation incorporated under the laws of the Commonwealth of Pennsylvania and engaged in the production and sale of certain products of the iron and steel industry. It owns and operates in the City of Harrisburg, in the County of Dauphin in said Commonwealth, a plant which has an annual capacity of 200,000 tons of sheared plates and sheets, universal plates and rolled blooms and billets for forging purposes.

4

At its above-mentioned plant Central employs at the present time approximately 1,200 wage earners, of whom approximately 150 are common laborers. Such common laborers are paid at the rate of 54 cents an hour, which is the base rate of pay of Central for common labor. Substantially all the other wage earners employed by Central at such plant are paid at rates of pay in excess of such base rates of pay for common labor, which rates are, in most instances, computed by adding various differentials to such base rate.

Central has sold iron and steel products to various agencies of the United States for more than 20 years, and only

during short periods in that time has it been without a Government contract in progress. It desires to continue to bid on contracts of agencies of the United States for such products in the future. The tonnage of products furnished by Central to agencies of the United States during the last ten years has averaged about 8% of the tonnage of Central. The products which Central has manufactured or furnished to such agencies include plates, slabs and sheets. The agencies of the United States to which such products have been sold, pursuant to contracts, include the Department of the Navy and the War Department.

7. Plaintiff Harrisburg Steel Corporation (hereinafter sometimes referred to as Harrisburg) is a corporation incorporated under the laws of the Commonwealth of Pennsylvania and engaged in the production and sale of certain products of the iron and steel industry. It owns and operates in the City of Harrisburg, in the County of Dauphin in said Commonwealth, a plant which has an annual capacity of 77,500 tons of steel ingots. Among the products manufactured by it are steel billets, slabs, coils, couplings, cylinders, flanges, liquefiers and munitions.

At its above-mentioned plant Harrisburg employs at the present time approximately 815 wage earners, of whom approximately 35 are common laborers. Such common laborers are paid at the rate of 54 cents an hour, which is the base rate of pay of Harrisburg for common labor. All the other wage earners employed by Harrisburg at such plant are paid at rates of pay in excess of such base rate of pay for common labor, which rates are computed by adding various differentials to such base rate.

Harrisburg has for upwards of 20 years entered into and performed contracts with various agencies of the United States with respect to the sale of steel products and desires to continue to bid on such contracts. The amounts of the gross sales by Harrisburg of such products to agencies of the United States during the years 1937 and 1938 are $184,807 and $71,436, respectively. The agencies of the United States to which Harrisburg sold such products in such years included the Department of the Navy, the Department of War and the Department of the Interior. The principal products which were sold to such agencies during such years were high pressure gas cylinders, steel flanges and aerial bombs.

5 8. Plaintiff The Eastern Rolling Mill Company (hereinafter sometimes referred to as Eastern) is a corporation incorporated under the laws of the State of Maryland and engaged in the production and sale of certain products of the iron and steel industry. It owns and operates at Colgate, which is in the County of Baltimore in said State and immediately outside the limits of the City of Baltimore, a plant which has an annual capacity of 90,000 tons of hot rolled annealed sheets, including 33,500 tons of galvanized sheets.

At its above-mentioned plant Eastern employs at the present time approximately 500 wage earners, of whom approximately 80 are common laborers. Such common laborers are paid at the rate of 53 cents an hour, which is the base rate of pay of Eastern for common labor. All the other wage earners employed by Eastern at such plant are paid at rates of pay in excess of such base rate of pay for common labor, which rates are generally computed by adding various differentials to such base rate.

Eastern is a party to an agreement with the Steel Workers Organizing Committee and said base rate of pay for common labor of 53 cents an hour is paid in accordance with said agreement.

Eastern has sold iron and steel products to various agencies of the United States over a period of years and desires to continue to bid on contracts of agencies of the United States for such products in the future. The amounts of the gross sales by Eastern of iron and steel products to agencies of the United States during the years 1937 and 1938 are approximately $27,000 and $3,350, respectively. Such sales were principally to the Department of the Navy. The products which were sold to said agency of the United States during such years included black, galvanized and stainless sheets.

9. Plaintiff The Atlantic Wire Company (hereinafter sometimes referred to as Atlantic) is a corporation incorporated under the laws of the State of Connecticut and engaged in the production and sale of plain and galvanized steel wire. It owns and operates at Branford, in the County of New Haven in said State, a wire mill which has an annual capacity of approximately 22,000 tons of plain wire and 500 tons of galvanized wire.

At its above-mentioned plant Atlantic employs at the present time approximately 150 wage earners, of whom approximately 15 are common laborers, paid at the rate of 50½ cents an hour, which is the base rate of pay of Atlantic for common labor. Substantially all the other wage earners employed by Atlantic at such plant are paid at rates of pay in excess of such base rate of pay for common labor, which rates are generally computed by adding various differentials to such base rate.

Atlantic desires to bid on contracts of agencies of the United States for products manufactured by it.

10. None of the plaintiffs is classified in the Iron and Steel Industry as a large, fully integrated company. The plaintiffs are respectively classified in such Industry as either medium-sized or small companies.

11. On information and belief, defendant Frances Perkins is Secretary of Labor and head of the Department of Labor of the United States, an executive department of the United States, and has her official residence as such Secretary, and resides and is found, in the District of Columbia. She is sued herein as defendant individually and in her official capacity as such Secretary.

6 12. On information and belief, defendant Charles V. McLaughlin is the Assistant Secretary of Labor of the United States, and has his official residence as such Assistant Secretary, and resides and is found, in the District of Columbia. He is sued herein as defendant individually and in his official capacity as such Assistant Secretary.

13. On information and belief, defendant L. Metcalfe Walling is Administrator of the Division of Public Contracts of the Department of Labor, and has his official residence as such Administrator, and resides and is found, in the District of Columbia. He is sued herein as defendant individually and in his official capacity as such Administrator.

14. On information and belief, defendant Henry Morgenthau, Jr. is Secretary of the Treasury and head of the Department of the Treasury of the United States, an executive department of the United States, and has his official residence as such Secretary, and resides and is found, in the District of Columbia. He is sued herein as defendant individually and in his official capacity as such Secretary.

On information and belief, all contracts made and entered into by the Department of the Treasury, including the bureaus and administrative units thereof, are made and entered into by or under the authority of defendant Morgenthau; and the invitations and advertisements for such contracts, the specifications for such contracts, the acceptance of bids for such contracts and the execution of such contracts are subject to the general supervision and control of said defendant.

15. On information and belief, defendant Christian Joy Peoples is the Director of Procurement of the Procurement Division of the Department of the Treasury of the United States, and has his official residence as such Director, and resides and is found, in the District of Columbia. He is sued herein individually and in his official capacity as such Director.

16. The Procurement Division of the Department of the Treasury was created by Executive Order No. 6166, dated June 10, 1933, which Order was issued pursuant to the Act of Congress of June 30, 1932, c. 314, §403, 47 Stat. 413, as amended by the Act of Congress of March 3, 1933, c. 212, Title II, §16, 47 Stat. 1518 (United States Code, Supplement IV, Title 5, Section 126). Said Executive Order provides, in substance and among other things, that said Procurement Division shall possess the function of determination of policies and methods of procurement, warehousing and distribution of property, facilities, structures, improvements, machinery, equipment, stores and supplies exercised by any agency of the United States and that when said Division shall have prescribed the manner of procurement, warehousing or distribution of any thing, no such agency shall thereafter procure, warehouse or distribute such thing in any manner other than so prescribed. Pursuant to said Executive Order, the defendant Peoples from time to time issues to the contracting officers of agencies of the United States rules, regulations and orders requiring the inclusion in contracts made by such officers of specified provisions and stipulations.

17. On information and belief, defendant Claude Augustus Swanson is Secretary of the Navy and head of
7 the Department of the Navy of the United States, an executive department of the United States, and has his official residence as such Secretary in, and resides and is

found in, the District of Columbia. He is sued herein as defendant individually and in his official capacity as such Secretary.

On information and belief, all contracts made and entered into by the Department of the Navy, including the bureaus and administrative units thereof, are made and entered into by or under the authority of defendant Swanson; and the invitations and advertisements for bids for such contracts, the specifications for such contracts, the acceptance of bids for such contracts and the execution of such contracts are subject to the general supervision and control of said defendant.

18. Upon information and belief, defendant Harry Hines Woodring is Secretary of War and head of the Department of War of the United States, an executive department of the United States, and has his official residence as such Secretary, and resides and is found, in the District of Columbia. He is sued herein as defendant individually and in his official capacity as such Secretary.

On information and belief, all contracts made and entered into by the Department of War, including the bureaus and administrative units thereof, are made and entered into by or under the authority of defendant Woodring; and the invitations and advertisements for bids for such contracts, the specifications for such contracts, the acceptance of bids for such contracts and the execution of such contracts are subject to the general supervision and control of said defendant.

19. Upon information and belief, defendant Harold L. Ickes is Secretary of the Interior and head of the Department of the Interior of the United States, an executive department of the United States, and has his official residence as such Secretary, and is found, in the District of Columbia. He is sued herein as defendant individually and in his official capacity as such Secretary.

On information and belief, all contracts made and entered into by the Department of the Interior, including the bureaus and administrative units thereof, are made and entered into by or under the authority of defendant Ickes; and the invitations and advertisements for bids for such contracts, the specifications for such contracts, the acceptance of bids for such contracts and the execution of such contracts are subject to the general supervision and control of said defendant.

20. Upon information and belief, defendant James A. Farley is Postmaster General and head of the Post Office Department of the United States, an executive department of the United States, and has his official residence as such Postmaster General, and resides and is found, in the District of Columbia. He is sued herein as defendant individually and in his official capacity as such Postmaster General.

On information and belief, all contracts made and entered into by the Post Office Department, including the bureaus and administrative units thereof, are made and entered into by or under the authority of defendant Farley; and the invitations and advertisements for bids for such contracts, the specifications for such contracts, the acceptance of bids for such contracts and the execution of such contracts are subject to the general supervision and control of said defendant.

8 21. On information and belief, except as otherwise expressly provided by law, all contracts for materials, supplies, articles and equipment made or entered into by any executive department, independent establishment, or other agency of the United States are required by law to be made or entered into, after advertising a sufficient time previously for proposals respecting the same, with the lowest responsible bidder; and except as aforesaid, neither any such executive department, independent establishment or other agency or instrumentality, nor any contracting officer acting on behalf thereof, may lawfully insert in any such contract any stipulation or provision requiring any contractor a party thereto to pay to the persons employed by such contractor in the performance of such contract any particular wages or rate of wages.

22. On information and belief Section 1 of the Public Contracts Act provides, in substance and among other things, that in any contract made and entered into by "any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States" (all the foregoing being collectively referred to in this complaint as agencies of the United States and any one thereof being referred to herein as an agency of the United States), for the manufacture or furnishing of materials, supplies,

rticles and equipment in any amount exceeding $10,000, here shall be included a representation and stipulation:

"(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract:".

23. On information and belief, Section 11 of the Act provides, in substance, that the Act shall apply to all contracts entered into pursuant to invitations for bids issued on or after 90 days after the effective date of the Act: "*Provided, however,* That the provisions requiring the inclusion of representations with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor." The Act became effective on June 30, 1936.

24. On information and belief, Section 2 of the Act provides, in substance and among other things, that any breach or violation of any representation or stipulation with respect to minimum wages in any contract, as provided for in Section 1 of the Act, shall render the party responsible therefor liable to the United States for "liquidated damages", in addition to damages for any other breach of such contract, in a sum equal to the amount of any underpayment of wages to any employee engaged in the performance of such contract; that any such sum may be withheld from any amounts due on any such contract or may be recovered in a suit brought in the name of the United States by the Attorney General thereof; and that, in addition, the agency of the United States entering into such contract shall have the right to cancel such contract and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor.

25. On information and belief, Section 3 of the Act provides, in substance, that the Comptroller General is author-

ized and directed to distribute a list to all agencies of the United States containing the names of persons or firms found by the Secretary of Labor to have breached any agreement or representation required by the Act; and that unless the Secretary of Labor otherwise recommends, no contracts shall be awarded to such persons or firms or to any firm, corporation, partnership or association in which such persons or firms have a controlling interest until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred.

26. On information and belief, Sections 4 and 5 of the Act provide, in substance and among other things, that the Secretary of Labor is authorized and directed to administer the provisions of the Act; that the Secretary of Labor shall appoint an administrative officer, and such attorneys and experts and other employees as he may from time to time find necessary for the administration of the Act; that the Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of the Act; that the Secretary of Labor or his authorized representatives shall have power to make investigations and findings as provided in the Act; that the "Secretary of Labor, or an impartial representative designated by him", shall, upon his own motion, or as otherwise provided therein, have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath, "and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States and if supported by the preponderance of the evidence shall be conclusive in any court of the United States"; and that the Secretary of Labor or authorized representative "shall have the power, and is * * * authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of" the Act.

27. On information and belief, the defendant Perkins, as Secretary of Labor, purporting to act pursuant to the authority vested in her by Section 4 of the Act, by an Administrative Order dated October 6, 1936, created in the Department of Labor a board known as the Public Contracts Board (hereinafter called the Board) with authority to conduct hearings and to make findings of fact for the

consideration of the Secretary of Labor on the following matters arising under the Act, viz.: Requests for exceptions and exemptions; establishment of special overtime rates; determination of violations of the Act; "establishment of prevailing minimum wages"; and appeals from the rulings of other agencies.

28. On information and belief, the defendant Perkins, as Secretary of Labor, purporting to act pursuant to the authority vested in her by Section 4 of the Act, at some time prior to July 1, 1938, appointed the defendant Walling Administrator of the Division of Public Contracts of the Department of Labor (such administrator being hereinafter referred to as the Administrator). On July 1, 1938, and at all times subsequent thereto mentioned in this complaint, the defendant Walling was the Administrator, and, as such, in charge of the administration of the provisions of the Act, subject to the supervision and control of the defendant Perkins, as Secretary of Labor.

29. Prior to July 11, 1938, the Secretary of Labor had not determined, nor had any proceeding been instituted to determine, the prevailing minimum wages paid to persons employed in the iron and steel industry, or any branch thereof, in any locality in the United States.

30. On information and belief, on or about July 11, 1938, the defendant Walling, as the Administrator, caused to be mailed to various manufacturers of iron and steel products (including the plaintiffs), trade associations, trade unions and others, a notice, dated July 11, 1938, in which it was stated, in substance and among other things, that the Board would hold a hearing on July 25, 1938, to take testimony upon which findings of fact would be made "to assist the Secretary of Labor in determining, pursuant to Section 1(b) of the Public Contracts Act, the prevailing minimum wages in the Iron and Steel Industry" and that at said hearing "an opportunity to be heard, either in person or by duly appointed representatives", would "be given to persons engaged in the above named industry, either as employees or as employers, to groups of such persons, and to others within the discretion of the Board." A copy of said notice is annexed hereto as Exhibit A.

31. On July 25, 1938, and July 26, 1938, the Board held what was described by it as a "hearing" (hereinafter called

the hearing), pursuant to said notice, in a proceeding entitled "In the Matter of Prevailing Minimum Wages in the Iron and Steel Industry". The record in said proceeding is hereinafter called the Record. The Board consisted on said dates and at all times hereinafter mentioned to and including October 27, 1938, of Thomas Holland, Chairman, Robert Nelson Campbell and Oscar R. Strackbein.

32. The hearing was adjourned on July 26, 1938. On information and belief, pursuant to announcement by the Board at the hearing and to subsequent notice by the defendant Walling, as the Administrator, the Record was kept open for the submission by interested parties of additional facts until August 8, 1938, and interested parties were permitted to file briefs on or before August 22, 1938.

33. Plaintiffs Central, Eastern, Harrisburg, Lukens and South Chester, various other manufacturers of iron and steel products, certain trade associations and certain labor organizations, including the Steel Workers Organizing Committee and the Amalgamated Association of Iron, Steel and Tin Workers of North America, appeared at the hearing. Sworn testimony was not taken at the hearing. What was received by the Board as "evidence" (hereinafter sometimes called the evidence) and included in the Record consisted of unsworn statements made at the hearing by various individuals, exhibits, statistical data and other documents offered thereat by representatives of the Department of Labor and other parties, and letters, telegrams, briefs and other documents received by the Board during the hearing or thereafter and prior to August 23, 1938. All the plaintiffs either made statements, through representatives, at the hearing, or filed with the Board written statements and data, which were incorporated in the Record. All plaintiffs filed with the Board a brief which was incorporated in the Record.

34. On or about November 7, 1938, the defendant Walling, as the Administrator, mailed to the plaintiffs and other persons a notice dated November 7, 1938, "To all Persons Interested in the Matter of the Determination of the Prevailing Minimum Wages in the Iron and Steel Industry", to which was annexed a copy of a press release of the United States Department of Labor, numbered (5603) and headed "For Release Sunday, November 6, 1938". Said notice stated that said press release contained a "Summary

of the Recommendations of the Public Contracts Board in the Matter of the Prevailing Minimum Wages in the Iron and Steel Industry" which was presented to the addressees to whom it was sent in order that they might have full opportunity to register their objection or approval before any decision should be made by the Secretary of Labor. Said notice also stated that briefs might be filed with the Administrator within 21 days of the date thereof, at the end of which period the Board's recommendations, together with the briefs so filed, would be forwarded to the Secretary of Labor.

35. Promptly after receipt of such notice, plaintiffs, directly and by their attorney, requested of the defendant Walling, as the Administrator, a copy of the complete recommendations of the Board in the Matter of the Prevailing Minimum Wages in the Iron and Steel Industry, and also a copy of the full report and a copy of any report made by any member of the Board who did not join in a majority report. Such requests were, in the first instance, denied. Thereafter, and, as plaintiffs are informed and believe, and therefore allege, as a result of the protests of plaintiffs and others similarly situated, copies of the complete Findings of Fact, Conclusions and Recommendations of the Board dated October 27, 1938 (hereinafter called the Report) in said matter were sent to plaintiffs or to their attorney by the defendant Walling, as the Administrator, under date of November 19, 1938. A copy of the Report is annexed hereto as Exhibit B.

36. The Report was made up of a majority report (hereinafter called the Majority Report) signed by Thomas Holland, Chairman, and Robert Nelson Campbell (hereinafter collectively referred to as the Majority of the Board), and a minority report (hereinafter called the Minority Report) signed by Oscar R. Strackbein (hereinafter referred to as the Minority of the Board):

37. After stating certain findings of fact and conclusions, the Majority Report (at p. 136 of Exhibit B) concluded with the following recommendations, among others, to the Secretary of Labor:

"In view of the Findings of Fact made above, the Public Contracts Board respectfully recommends to the Secretary of Labor that the following wages be determined, within the meaning of section 1(b) of the Public Contracts Act, to

be the prevailing minimum wages for the manufacture or furnishing of the products of the Iron and Steel Industry.

"(1) 45 cents an hour within the area made up of
12 the States of Louisiana, Arkansas, Mississippi, North Carolina, South Carolina, Florida, Oklahoma, Texas, Alabama, Tennessee, Georgia, and Virginia.

"(2) 62.5 cents an hour within the area made up of the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, New Jersey, Maryland, Delaware, West Virginia, Kentucky, Ohio, Indiana, Michigan, Wisconsin, Illinois, Missouri, Iowa, Minnesota, North Dakota, South Dakota, Nebraska, Kansas, New Mexico, Colorado, Wyoming, Montana, Idaho, Utah, Arizona, Nevada, California, Oregon, Washington, and the District of Columbia.

"The Board recommends further

. . . .

"(2) that subsequent to a determination that the prevailing minimum wages in the Iron and Steel Industry are 45 cents in the South and 62.5 cents in the remainder of the industry, a study, and if necessary, further Findings of Fact be made with respect to the effect of the lower minimum wage on the competition in the industry for Government business;

"(3) that subsequent to a wage determination for the Iron and Steel Industry, a study be made of the position of the smaller companies in the competition for Government business in order that the Board may be placed in a position to advise the Secretary of Labor with respect to requests for exemptions under section 6 of the Act, should the occasion arise;

. . . . ."

38. On information and belief, the Majority of the Board, in the Majority Report, palpably misinterpreted and misconstrued the Act, and particularly Section 1 (b) thereof; proceeded upon a completely erroneous conception of the powers and duties of the Secretary of Labor thereunder; and, consequently, recommended that the defendant Perkins, as Secretary of Labor, take action which said defendant was completely without authority to take.

The Majority of the Board did not even purport to make any finding or recommendation with respect to the deter-

mination of the minimum wages actually prevailing for persons employed in the Iron and Steel Industry in the several "localities" in which the plants of members of such Industry are situated and, in which, therefore, there might be manufactured or furnished products of such Industry pursuant to contracts therefor with agencies of the United States, nor did such Majority purport to make any such finding or recommendation with respect to the minimum wages actually prevailing for persons employed in such "localities" on similar work or in similar industries or groups of industries. Instead, it recommended to the defendant Perkins, as Secretary of Labor, that she determine that the prevailing minimum wages for the manufacture or furnishing of the products of the Iron and Steel Industry were 45 cents an hour within an "area made up of" 12 13 States, including approximately 822,000 square miles of territory, or approximately 25% of the entire United States, and were 62½ cents an hour within an "area made up of" the remaining 36 States of the United States and the District of Columbia.

39. On information and belief, the Minority of the Board, in the Minority Report, also palpably misinterpreted and misconstrued the Act, and particularly Section 1 (b) thereof; proceeded upon a completely erroneous conception of the powers and duties of the Secretary of Labor thereunder; and consequently, also recommended that the defendant Perkins, as Secretary of Labor, take action which said defendant was completely without the authority to take.

Notwithstanding such palpably erroneous construction of the Act, in which the Minority of the Board concurred with the Majority of the Board, however, the Minority disagreed with the Majority in the application of the Act, so construed, to the facts in the Record.

While accepting the facts found by the Majority of the Board, as distinguished from the inferences and conclusions drawn therefrom by the Majority, the Minority Report stated that "the lower base wages generally paid in the region lying east of what is generally known as the Pittsburgh District constitute it, in my opinion, a separate region with respect to the prevailing minimum wages" and that the Board did "not have before it essential information" which would permit the "area" east of Pittsburgh to

be included in the same "region", for purposes of determining prevailing minimum wages, as the "area" west of the "Eastern District". The Minority Report, therefore, recommended that 56½ cents an hour should be determined to be the prevailing minimum wage in the Iron and Steel Industry in "that part of the United States lying east of a line drawn north and south through the most easterly part of Altoona, Pennsylvania, to the northern boundary of the State of Maryland; and the States of Maryland and Delaware, with such exceptions as may be provided for through special exemptions or limitations".

For similar reasons the Minority Report also recommended that the prevailing minimum wage rate of 55 cents an hour "should be applied to the States of Missouri and that part of Kentucky lying west of a line drawn north and south through the westernmost point of Boyd County; to that part of the State of Indiana lying south of a line drawn east and west from the northern boundary of Howard County; and to that part of Illinois lying south of a line drawn east and west from the northern boundary of Fayette County"; and that the prevailing minimum wage rate of 60 cents an hour "should apply in all the states lying west of Minnesota, Iowa, Missouri, Oklahoma, and Texas".

40. On December 5, 1938, D. S. Wolcott, J. H. Parker and John T. Whiting, as a Committee representing small Eastern producers of Iron and Steel products, including the plaintiffs, filed with defendant Walling, as the Administrator, a petition for the reopening of the hearing in the Matter of the Determination of the Prevailing Minimum Wages in the Iron and Steel Industry. A copy of said petition is annexed hereto as Exhibit C.

In said petition it was pointed out that while the Majority of the Board indicated that chief among its reasons for recommending a uniform minimum wage for the entire North and West of the country were the alleged exis-
14 tence of general competition among the plants situated in that geographic expanse of territory and the belief that "the requirements of the Government for a wage standard and the economic characteristics of the industry's markets require that a broad view of the entire wage structure of the industry in the North and West be taken, rather than a particular view of numerous local wage levels" (see

Exhibit B, p. 124), wherefore economic, as distinguished from geographical, factors must constitute the primary basis for the determination of the area in which prevailing minimum wages should be determined, the Majority Report itself recognized that there was insufficient evidence in the record to justify a determination of prevailing minimum wages on such erroneous basis by also recommending that, subsequent to the wage determination recommended, a study be made of the position of the smaller companies in the competition for Government business (see Exhibit C, pp. 4-12).

Said petition further urged, for similar reasons, that the further study of the effect of the lower rate in the South on competition in the industry must be made before any prevailing minimum determination was promulgated (see Exhibit C, pp. 13-16) and that the Board had failed to obtain adequate evidence with regard to, and to consider the effect of the proposed minimum wage determination upon, the wage rates in other industries and the general economic dislocation, particularly in the eastern United States, that would result from such proposed minimum wage determination (see Exhibit C, pp. 16-19).

On or about December 10, 1938, said petition was denied by the defendant Walling, as the Administrator.

41. As a result (as plaintiffs are informed and believe, and therefore allege) of the protests of plaintiffs and others similarly situated against the denial of the right of oral argument before the Secretary of Labor with respect to the Report, the recommendations contained therein and the proposed determination of prevailing minimum wages in the iron and steel industry, the defendant Walling, as the Administrator, on or about December 10, 1938, issued a notice, wherein it was stated that oral arguments would be held on December 20, 1938, to assist on the evidence of record and the recommendations of the Board in the determination of the prevailing minimum wages in the Iron and Steel Industry, that argument must be limited to evidence of record and that briefs might be filed until December 19, 1938.

42. On December 19, 1938, D. S. Wolcott, J. H. Parker and John T. Whiting, as a committee representing small Eastern producers of iron and steel products, including the

plaintiffs, filed with the defendant Walling, as the Administrator, the Exceptions of such small Eastern producers to the Report and a brief in support of said Exceptions. A copy of said Exceptions is annexed hereto as Exhibit D, and the exceptions set forth therein are renewed and realleged herein as if set forth herein at length.

43. On December 20 and 21, 1938, oral arguments In the Matter of the Determination of the Prevailing Minimum Wages in the Iron and Steel Industry were had before the defendant McLaughlin, who, at the commencement of such oral arguments, stated, in substance, that he was hearing such arguments as Assistant Secretary of Labor with power to act for and in the stead of the Secretary of Labor. Counsel for the plaintiffs appeared at said oral argument and argued on their behalf.

15 44. On or about January 16, 1939, the defendant McLaughlin, purporting to act pursuant to Section 1(b) of the Act, issued a statement in writing dated January 16, 1939, signed by him as Acting Secretary of Labor and entitled "In the Matter of the Determination of the Prevailing Minimum Wages in the Iron and Steel Industry" (said statement being hereinafter sometimes referred to as the Determination), wherein, among other things, he purported to define the Iron and Steel Industry and to determine the prevailing minimum wages for persons employed in the manufacture or furnishing of the products of the Iron and Steel Industry in six so-called "localities" which, in the aggregate, constituted the entire United States. A copy of the Determination is annexed hereto as Exhibit E.

The following statements appear at pages 17 to 19, inclusive, of the Determination:

"Upon all the evidence submitted in this matter, including the briefs filed and the oral arguments,

I Hereby Determine

(1) That the iron and steel industry is defined to mean and include the business of producing and selling all or any one or more of the following products:

Axels—rolled or forged
Bale ties—single loop
Bars—alloy steel, hot rolled

Bars—cold finished, carbon and alloy
Bars—concrete reinforcing, straight lengths
Bars, ingots, blooms and billets—iron
Bars—merchant steel
Bars—tool steel
Ferro—manganese and spiegeleisen
Girder rails and splice bars therefor
Ingots, blooms, billets and slabs—alloy
Ingots, blooms, billets and slabs—carbon
Light rails—60 pounds or less per yard—and splice bars and angle bars therefor
Standard tee rails of more than 60 pounds per yard—and angle bars and rail joints therefor, or any of such products
Mechanical tubing
Pig iron—foundry, high silicon silvery, malleable, open hearth basic, Bessemer and high silicon Bessemer
Pig iron—low phosphorus
Pipe—standard, line pipe and oil country tubular products
Plates
Posts—fence and sign
Railroad tie plates
Railroad track spikes
Sheet bars
Sheets
Skelp
Steel sheet piling
Strip steel—cold rolled
Strip steel—hot rolled
Structural shapes
16 Tubes—boiler
Tube rounds
Wheels—car, rolled steel
Wire—drawn
Wire hoops—twisted or welded
Wire nails and staples, twisted barbless wire, barbed wire, twisted wire fence stays and wire fencing (except chain-link fencing)
Wire rods
Wire—spring
Wire—telephone

(2) That the prevailing minimum wages for persons employed in the manufacture or furnishing of the products of the Iron and Steel Industry are the amounts indicated for each of the following localities whether arrived at on a time or piece work basis:

1. 45 cents per hour in the locality consisting of the states of Louisiana, Arkansas, Mississippi, North Carolina, South Carolina, Florida, Oklahoma, Texas, Alabama, Tennessee, Georgia, Virginia and West Virginia (except the counties of Hancock, Brooke, Ohio, Harrison, Monongalia, and Marshall);

2. 60 cents per hour in the locality consisting of the states of Washington, Oregon and California;

3. 60 cents per hour in the locality consisting of the states of Montana, Idaho, Nevada, Wyoming, New Mexico, Utah, Colorado and Arizona;

4. 58½ cents per hour in the locality consisting of the states of North Dakota, South Dakota, Nebraska, Kansas, Minnesota, Iowa, Missouri and the area in and about East Saint Louis, Illinois;

5. 62½ cents per hour in the locality consisting of the States of Wisconsin, Illinois, (except the area in and about East Saint Louis, Illinois), Michigan, and Indiana;

6. 62½ cents per hour in the locality consisting of Ohio, Pennsylvania, Delaware, Maryland, Kentucky, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, and Maine, and that portion of the State of West Virginia comprised within the counties of Hancock, Brooke, Ohio, Marshall, Harrison, and Monongalia, and the District of Columbia;

provided that apprentices may be employed at lower rates if their employment conforms to the standards of the Federal Committee on Apprenticeship.

"This determination shall be effective and the minimum wages hereby established for the respective localities shall apply to all contracts awarded subject to Public Act No. 846, 74th Congress, on or after January 31, 1939."

45. On information and belief, the defendant Perkins authorized, approved, consented to and actively participated in the Determination.

17 46. On or about January 20, 1939, plaintiffs, by their attorney, duly requested that the defendant

Perkins, as Secretary of Labor, postpone the effective date of the Determination for approximately 60 days until April 3, 1939.

47. On or about January 30, 1939, the defendant McLaughlin, by an instrument in writing dated January 30, 1939, signed by him as Acting Secretary of Labor and entitled "Postponement of Effective Date of Secretary of Labor's Decision in the Iron and Steel Industry", a copy of which is annexed hereto as Exhibit F, postponed the effective date of his "decision" In the Matter of the Determination of the Prevailing Minimum Wages in the Iron and Steel Industry until March 1, 1939.

48. On or about February 17, 1939, plaintiffs, by their attorney, in a communication directed to the defendant Perkins, as Secretary of Labor, duly renewed their original request that the effective date of the Determination be postponed until at least April 3, 1939. The defendant Perkins, as Secretary of Labor, has not granted such request and she and the defendant McLaughlin are threatening to make the Determination effective on March 1, 1939.

49. On information and belief, the Determination is void and wholly beyond the authority of the defendant Perkins, as Secretary of Labor, and the defendant McLaughlin, as Acting Secretary of Labor.

50. On information and belief, the defendant McLaughlin, as appears from the Determination, committed a plain error of law in interpreting the Act, and particularly Section 1(b) thereof; proceeded in the Determination upon a completely erroneous conception of the powers and duties of the Secretary of Labor thereunder; and, consequently, in purporting therein to determine the prevailing minimum wages for persons employed in the manufacture or furnishing of the products of the Iron and Steel Industry in the six so-called "localities" set forth in the Determination, acted arbitrarily and capriciously and wholly without warrant or authority in law.

As appears from the Determination (see Exhibit E, page 4) the principal question which the defendant McLaughlin purported to decide in the Determination, and that which underlay all other questions which he purported to decide therein (other than the definition of the Iron and Steel Industry), was a question of law, viz., "the construction to be

placed upon the language of Section 1(b) of the Public Contracts Act" and, particularly, the proper construction of the word "locality" as employed therein. While conceding in the Determination (see Exhibit E, pages 9 and 10) that the "word 'locality' used in the statute carries obvious geographic connotations", the defendant McLaughlin concluded that "other factors than geography must be used to assist the determination" and that "Undoubtedly the Board was correct in considering the economic facts of the industry itself to assist it to a conclusion." In substance, the interpretation placed upon the Act was that the Secretary of Labor was vested with a discretion in the light of economic factors to determine, in the case of each industry, that any geographic area, however large, is embraced within the term "locality".

18 The plaintiffs are informed and believe, and, therefore, aver, that the term "locality", as employed in Section 1(b) of the Act, means the city, county, village or other civil subdivision of a State in which work under a particular Government contract is to be performed, or the immediate vicinity of that place, or, at most, a small geographical area; that the authority in respect of determination of prevailing minimum wages conferred by the Act upon the Secretary of Labor is limited to the ascertainment of minimum wages actually and currently prevailing for persons employed on similar work or in the particular or similar industries or groups of industries in the locality (as above defined) in which the work under the particular Government contract is to be performed; and that the conclusion reached in the Determination that the States of Ohio, Pennsylvania, Delaware, Maryland, Kentucky, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire and Maine, and that portion of the State of West Virginia within the Counties of Hancock, Brooke, Ohio, Marshall, Harrison and Monongalia, and the District of Columbia, comprise a "locality" within the meaning of Section 1(b) of the Act, extends the meaning of that term beyond any permissible limits of construction and is wholly arbitrary and capricious and without warrant in law.

The plaintiffs are further informed and believe, and, therefore, aver, that if the term "locality" as used in Sec-

tion 1(b) of the Act were to be construed in the manner in which it was interpreted in the Determination, grave questions as to whether the Act, and particularly Section 1(b) thereof, is invalid as improperly delegating legislative authority, would be presented, since, under such construction, as pointed out in the Determination (see Exhibit E, page 10), "the language of the statute does not itself suggest answers to the questions which it raises."

51. For the purposes of the Determination, the defendant McLaughlin treated the common labor base rates of the various members of the industry which had submitted wage data as the minimum wages paid by such members.

62½ cents per hour was not at the date of the wage data set forth in the Record and the Report or at the date of the Determination or at any time subsequent thereto, and is not now, the prevailing common labor base rate, or the prevailing minimum wage, in the Iron and Steel Industry, in the localities, or any of them, in which any of the plants of the plaintiffs are located, but, as shown herein and as appears from the findings of fact in the Report, such prevailing common labor base rates, and prevailing minimum wages, were at all such times and are now substantially lower than 62½ cents per hour.

Plaintiffs are informed and believe, and therefore aver, that, as appears from the face of the Determination and the Report setting forth the wage data on which the Determination was based, the Determination constitutes an attempt on the part of the defendants Perkins and McLaughlin, purporting to act in their respective official capacities above set forth and under the guise and pretense of determining the minimum wages actually prevailing in the respective localities in which the plants of plaintiffs and other manufacturers of products of the Iron and Steel Industry are located, but, in fact, acting completely beyond any authority conferred upon them by law, to raise and fix the wage rates to be paid at such plants.

19 52. Plaintiffs are informed and believe, and, therefore, aver, that even if, as erroneously concluded by the defendant McLaughlin in the Determination, the Act conferred authority upon the Secretary of Labor, in determining prevailing minimum wages in the Iron and Steel Industry, to consider and give weight to relevant economic

factors in determining the size of areas within which prevailing minimum wages should be determined, the conclusion reached in the Determination that the States of Ohio, Pennsylvania, Delaware, Maryland, Kentucky, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire and Maine and that portion of the State of West Virginia comprised within the Counties of Hancock, Brooke, Ohio, Marshall, Harrison and Monongalia and the District of Columbia comprise a single "locality" is wholly arbitrary and capricious and without warrant in law for the following reasons, among others:

(a) The only so-called economic factor which is referred to in the Determination in that regard is the alleged fact that a single market area is predominantly served by the plants in the Iron and Steel Industry located in the above-mentioned area. On information and belief, such alleged fact (the existence of which plaintiffs deny) was wholly irrelevant to the determination of prevailing minimum wages in a locality in which iron and steel products are manufactured; and in giving controlling significance thereto the defendant McLaughlin completely misconstrued the Act and, in effect, converted it into one authorizing the fixing of wages that are to prevail for persons employed in a region in which materials and supplies or articles of equipment are sold;

(b) The defendant McLaughlin in the Determination completely and erroneously ignored the facts set forth in the Report and the Record which showed the existence of well-defined and long-established wage differentials existing among various districts in the so-called "locality" above mentioned. Such evidence showed conclusively that there are in the Iron and Steel Industry well recognized and long-existing wage differentials between the plants in the industry which are located in the Western portion (hereinafter sometimes called the Western District) of the so-called "locality" referred to in subparagraph (a) above and those plants which were included by said defendant in said "locality" but which are also located in what are known in the industry as the "Eastern District", the "Buffalo District" and the "Johnstown District". The areas, substantially as recognized for minimum wage purposes by the Code of Fair Competition for the Iron and

Steel Industry, as amended May 30, 1934, covered by the Eastern District, the Buffalo District and the Johnstown District, are as follows:

(i) The Eastern District comprises the New England States and the States of Delaware, New Jersey and Maryland; that part of the States of New York and Pennsylvania lying east of a line drawn north and south through the most easterly point of Altoona, Pennsylvania; and that part of the State of West Virginia lying south of a line drawn west in extension of the southerly boundary of the State of Pennsylvania.

(ii) The Buffalo District comprises that part of the State of New York lying west of the westerly boundary of the Eastern District, and the Counties of Erie, Crawford and Warren in the State of Pennsylvania.

(iii) The Johnstown District comprises the County of Cambria and the City of Altoona, Pennsylvania.

The plants of all the plaintiffs are located in such Eastern District. There are attached hereto as Exhibit G tables compiled from the table set forth on pages 12 to 23, inclusive, of the Report, showing for each of such three Districts, and for the Western District, the base rates for common labor that were being paid in July, 1938, at the plants of the Iron and Steel Industry located therein concerning which wage data are set forth in the Report, the location of such plants, the total number of wage earners then employed at such plants and the total number of common laborers at such plants who were then receiving the base rate for common labor. The following table shows in summary form the information contained in such first-mentioned tables:

	No. of Plants	No. of Wage Earners	No. of Common Laborers
Eastern District—Base Rates			
Under 56½¢	32	8,522	1,355
Exactly 56½¢	18	38,069	3,854
Over 56½¢ but under 62½¢	7	4,200	217
Exactly 62½¢	3	3,602	115
Over 62½¢	—	—	—
	60	54,393	5,541

	No. of Plants	No. of Wage Earners	No. of Common Laborers
Buffalo District—Base Rates			
Under 56½¢	4	1,412	171
Exactly 56½¢	—	—	—
Over 56½¢ but under 62½¢	5	9,467	811
Exactly 62½¢	—	—	—
Over 62½¢	—	—	—
	9	10,879	982
Johnstown District—Base Rates			
Under 56½¢	—	—	—
Exactly 56½¢	—	—	—
Over 56½¢ but under 62½¢	2	8,886	603
Exactly 62½¢	—	—	—
Over 62½¢	—	—	—
	2	8,886	603
Western District—Base Rates			
Under 56½¢	6	4,909	817
Exactly 56½¢	1	53	23
Over 56½¢ but under 62½¢	3	973	39
Exactly 62½¢	91	149,319	10,561
Over 62½¢	1	501	43
	102	155,755	11,483
Total of Such Districts—Base Rates			
Under 56½¢	42	14,843	2,343
Exactly 56½¢	19	38,122	3,877
Over 56½¢ but under 62½¢	17	23,526	1,670
Exactly 62½¢	94	152,921	10,676
Over 62½¢	1	501	43
	173	229,913	18,609

21 From such tables it clearly appears that the prevailing minimum wage for common labor at the plants of the Iron and Steel Industry located in the above-mentioned Eastern District is not more than 56½ cents and is probably a lesser amount; in the above-mentioned Buffalo District is not more than 59½ cents an hour; and in the above-mentioned Johnstown District is not more than 58½ cents an hour.

53. The plaintiffs are informed and believe, and, therefore, aver, that there is no evidence in the Record to support the purported determination made in the Determination that the area embraced within the States of Ohio, Pennsylvania, Delaware, Maryland, Kentucky, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire and Maine, and that portion of the State of West Virginia comprised within the Counties of Hancock, Brooke, Ohio, Marshall, Harrison and Monongalia, and the District of Columbia, constitutes a "locality" for the pur-

pose of determining prevailing minimum wages under Section 1(b) of the Act, for persons employed therein in the manufacture or furnishing of the products of the Iron and Steel Industry, and that, therefore, said purported determination is wholly arbitrary and capricious and without warrant in law.

54. The plaintiffs are informed and believe, and, therefore, aver, that the purported determination referred to in the preceding paragraph 53 hereof is not supported by the preponderance of the evidence in the Record, and is, therefore, without warrant in law.

55. The plaintiffs are informed and believe, and, therefore, aver, that the purported determination referred to in the foregoing paragraph 46 hereof is arbitrary and capricious and without warrant in law for the reason that it was made by the defendant McLaughlin without there having been accorded to the plaintiffs the fair hearing which the Secretary of Labor was required by the Act, and particularly Section 5 thereof, to give to the plaintiffs prior to the making of any determination of the prevailing minimum wages in the Iron and Steel Industry in the respective localities in which the plants of the plaintiffs are located, in that:

(a) in making said purported determination, the defendant McLaughlin took into consideration, and based said proposed determination in whole or in part upon, facts and matter which were not contained in the Record and which were not properly before him for consideration. The only document (other than the Report) referred to in the Determination was a report allegedly made to an Annual Meeting of Stockholders of United States Steel Corporation (see Exhibit E, page 8), and there was not any such report contained in the Record;

(b) the defendant Walling denied the above-mentioned petition by the Committee representing small Eastern producers of iron and steel products, including the plaintiffs, for the reopening of the hearing In the Matter of the Determination of the Prevailing Minimum Wages in the Iron and Steel Industry, and by such denial the plaintiffs were prevented from presenting for consideration, prior to the making of any such determination, information and matter which, on the basis of the construction of the Act

adopted by the Board and the defendant McLaughlin (and disputed by the plaintiffs), were material and relevant; and

(c) the defendant McLaughlin, in making the De-
22 termination, was not impartial, as required by the Act, but was, in fact, arbitrary and capricious.

56. The defendant Perkins, purporting to act as Secretary of Labor, the defendant McLaughlin, purporting to act as Assistant and Acting Secretary of Labor, and the defendant Walling, purporting to act as the Administrator, have been and are threatening to require that there be included in every contract made and entered into after March 1, 1939, by any agency of the United States, for the manufacture or furnishing of products of the Iron and Steel Industry (as that Industry is defined in the Determination), in any amount exceeding $10,000, a stipulation or representation that any person employed by the contractor in the manufacture or furnishing of any of such products used in the performance of the contract will be paid, without subsequent deduction or repayment on any account, not less than the minimum wages set forth in the Determination, or a stipulation or representation of like purport and effect; and the defendant Peoples, acting pursuant to the direction and instruction of the defendants Perkins, McLaughlin and Walling, and purporting to act as Director of Procurement, has directed and threatens to continue to direct every agency of the United States desiring to enter into any such contract after March 1, 1939, to include such a stipulation in such contract and the invitations to bid therefor.

57. Article 1 of Regulations No. 504 prescribed by the Secretary of Labor under the Act (Series A) provides, in part, as follows:

"ARTICLE 1. (Insertion of Stipulations.)—Except as hereinafter directed, in every contract made and entered into by an executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States, for the manufacture or furnishing of materials, supplies, articles, and equipment, with respect to which invitations for bids are issued on or after September 28, 1936, the contracting officer shall cause to be in-

serted in such invitation or the specifications and in such contract, the following stipulations:

"Representations and stipulations pursuant to Public Act No. 846, Seventy-fourth Congress:

* * * * * *

"(b) All persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under the contract: *Provided, however,* That this stipulation with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor."

23. On information and belief, the Act does not authorize the Secretary of Labor to adopt any regulation requiring the insertion in any contract of any provision with respect to minimum wages in any industry unless and until the Secretary of Labor has made a valid determination with respect to minimum wages in such industry.

Article 1101 of such Regulations provides as follows:

"ART. 1101. (Minimum Wages).—Until a determination of the prevailing minimum wage for a particular industry or group of industries has been made by the Secretary of Labor prior to the invitation for bids, the stipulation with respect to wages in section 1 (b) of the Act will be inoperative, as provided in article 1 (b) of these Regulations.

"Determinations of prevailing minimum wages or changes therein will be published in the Federal Register and sent to contracting officers through circular letters of the Procurement Division, of the Treasury. Such determinations will be effective upon the dates fixed therein."

58. On information and belief, there have been issued by or under the authority of the defendant Swanson, as Secretary of the Navy, invitations to bid on contracts to be made by or under the authority of said defendant for the

purchase of products of the Iron and Steel Industry, as defined in the Determination, which invitations to bid will be opened by agents or representatives of said defendant on or about March 2, 1939, with a view to awarding contracts thereon, as follows:

Schedule No.	Product covered thereby	Approximate tons of product	Date for opening of Bid
5680	Shapes	777	Mar. 2, 1939
5681	Plates, Sheets and Strip	7375	Mar. 2, 1939
5682	Bars and Strip	209	Mar. 2, 1939
900-2380	Special Steel angles and shapes	1505	Mar. 9, 1939
900-2381	Special Steel I-Beams	300	Mar. 9, 1939

In each of such invitations to bid the attention of the bidders is invited to the Determination, and there is set out in full that portion of the Determination which listed the various "localities" covered thereby and their respective prevailing minimum wage rates. Each of such invitations to bid contains the following statement, referring to the Determination:

"The determination shall be effective and the minimum wages hereby established for the respective localities shall apply to all *contracts awarded* subject to Public Act No. 846, 74th Congress, *on or after March 1, 1939.*" (Italics in original; underscoring supplied.)

Plaintiffs Lukens, Alan Wood and Central desire to submit bids on the above Schedule 5681, and some or all of the plaintiffs desire to bid on some or all of the other schedules above set forth.

59. On information and belief, the last quoted paragraph was inserted in such bids at the instance of the defendants Perkins, McLaughlin, Walling and Peoples. Notwithstanding the provisions of Article 1101 of the Regulations above referred to, the defendants Perkins, McLaughlin and Walling have arbitrarily and capriciously and contrary
24 to the provisions of such Article and to the provisions of Section 11 of the Act, specifically ruled that every contract made and entered into after March 1, 1939, pursuant to invitations for bids issued prior to said date, by any agency of the United States for the manufacture or furnishing of products of the Iron and Steel Industry (as that industry is defined in the Determination) in any amount exceeding $10,000 must contain a stipulation or representation that any person employed by the contractor

in the manufacture or furnishing of any of such products used in the performance of the contract, will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages set forth in the Determination, or a stipulation or representation of like purport and effect.

On information and belief, the defendants Morgenthau, Swanson, Woodring, Ickes and Farley, purporting to act in their respective official capacities above set forth, and their subordinates, intend to, and will, unless the injunctive relief prayed herein is granted, require the insertion of such a representation or stipulation in every such contract awarded on and after March 1, 1939, even though the invitations for bids thereon were issued prior to said date, and require the insertion in every invitation issued on and after March 1, 1939, to bid on any such contract, and in every advertisement so made for bids on any such contract, and in the specifications so issued for any such contract, and in every bid on any such contract, and in every required form for any such bid, and in every such contract, such a stipulation or representation, or a stipulation of like purport or effect.

60. Appropriations which are among the largest, if not the largest in the nation's history for the purchase by the Department of the Navy, the War Department, the Department of the Treasury, the Department of the Interior and the Post Office Department of products of the Iron and Steel Industry (as defined in the Determination) have been made within the past year and, on information and belief, will be made within the immediate future. Large sums out of the appropriations heretofore made for such purchases have not yet been expended. On information and belief, invitations to bid on numerous large and important contracts for the purposes hereinabove referred to will be issued, and such contracts will be awarded, within the immediate future.

Plaintiffs are desirous of bidding on such contracts.

61. Unless a temporary restraining order as prayed in paragraph 1 of the prayer for relief herein be granted forthwith, to-wit, a temporary restraining order which shall in substance, restrain and enjoin the defendants Perkins, McLaughlin and Walling, individually and in their respec-

tive official capacities above set forth, from causing or permitting the Determination to become effective, and restraining and enjoining the other defendants named herein, individually and in their respective official capacities above set forth, from giving effect to the Determination in the bidding upon, and award of, public contracts, and from complying with Article 1(b) of Regulations No. 504 prescribed by the Secretary of Labor under the Act (Series A) set forth in paragraph 57 hereof, and unless a preliminary injunction *pendente lite* is granted as prayed in paragraph 3 of the prayer for relief, and unless, upon final hearing, a permanent injunction is granted as prayed in paragraph 4 of the prayer for relief, the plaintiffs will suffer immediate and irreparable injury, for which they have no
25 adequate remedy at law, for the following reasons, among others:

(i) The plaintiffs will be deprived of their lawful right to bid on contracts for the manufacture or furnishing to any agency of the United States, including the executive departments of which the heads thereof are defendants named herein, of any of the products of the Iron and Steel Industry (as defined in the Determination), free of limitations other than those imposed by Congress, and will be precluded from selling to any such agency any of such products, unless the plaintiffs shall agree, in each contract for the sale to any such agency of any such products in an amount in excess of $10,000, to pay the persons employed in the performance of such contract at the rate of wages specified in the Determination. The plaintiffs will be deprived of such right, and will be required so to agree, not by any statute of the United States or by any action lawfully taken thereunder by any officer or agent of the United States, but by reason of arbitrary and capricious acts of the defendants in excess of and without warrant of, but under color of, authority conferred upon them by law.

(ii) As heretofore shown herein, the bids on substantial contracts to be awarded by or under the authority of the defendant Swanson, on which contracts or parts thereof certain plaintiffs heretofore named desire to submit bids, are to be opened on or shortly after March 1, 1939. As also heretofore shown herein, numerous other valuable and important contracts will be let by or under the authority of

defendants named herein within a relatively short time after March 1, 1939. If the plaintiffs should submit bids upon any such contract, and enter into any such contracts, which include stipulations or representations in terms or to the effect that the plaintiffs will pay to persons employed by the plaintiffs in the performance of such contracts the minimum wages set forth in the Determination, the plaintiffs would be in danger of being estopped, and counsel for the plaintiffs have advised the plaintiffs that a court might hold that they were estopped, to secure a judicial determination of the invalidity of the Determination. Moreover, the penalties provided in Sections 2 and 3 of the Act for non-compliance with any such stipulation or representation would impose upon the plaintiffs the burden of obtaining a judicial decision of the question of the validity of the Determination only upon the condition that, if unsuccessful, the plaintiffs must pay excessive penalties, have their contracts subject to cancellation, and be precluded from obtaining the award of any public contract for three years, unless the Secretary of Labor otherwise recommends. Such penalties are so severe as in effect to close all approaches to the courts and deprive the plaintiffs of any adequate remedy at law in the premises.

(iii) As has heretofore been shown, the rates of pay for wage earners employed by the plaintiffs at other than common labor base rates of the respective plaintiffs for common labor are generally ascertained by adding various differentials to such common labor base rates, respectively, and an increase in such common labor base rates will, as a practical matter, necessarily result in an increase in the rates of pay for such other persons. Furthermore, it will be impracticable, in the case of any of the plaintiffs who enter into contracts with an agency of the United States requiring an increase in the base rate of pay for persons employed in a particular plant by such plaintiff in the performance of such contract, to fail correspondingly to increase the base rate of pay for other wage earners employed by such plaintiff on other matters in such plant.

26

(iv) If the plaintiffs are required to pay the minimum wages fixed in the Determination, there is grave danger that they will no longer be able successfully to compete for

Government contracts since large, fully integrated companies enjoying more favorable geographic locations from the standpoint of proximity to sources of supply for the raw materials used by them, proximity to the markets for their products and freight rate differentials should be able to underbid plaintiffs, if the plaintiffs must pay the same minimum wages as such competitors are now paying. On the other hand, if plaintiffs do not agree to pay such minimum wages, they will be in grave danger of losing a substantial source of revenue.

(v) The plaintiffs have been advised by counsel, and therefore believe and allege, that there does not exist any timely, plain, adequate or complete remedy at law for the protection of their lawful rights as herein set forth and the prevention of the irreparable and irrecoverable damages thereto which will occur if the Determination is permitted to become effective.

62. The plaintiffs are advised by counsel, and therefore believe and allege, that they are entitled to receive from this Court a declaratory judgment declaring their rights in the premises.

WHEREFORE, the plaintiffs pray:

1. That a temporary restraining order be granted forthwith

(a) restraining and enjoining the defendants Frances Perkins, Charles V. McLaughlin and L. Metcalfe Walling, and each of them, individually and in their respective official capacities above set forth, their and each of their officers, agents, assistants, employees, representatives and attorneys, and any one associated with or acting in concert or participation with them or any of them, and their successors in office, and each of them, and their officers, agents, assistants, employees, representatives and attorneys, and any one associated with or acting in concert or participation with them or any of them, and each of them, from causing or permitting to become effective, and from promulgating, publishing or holding out, or causing or permitting to be promulgated, published or held out, as effective or valid or authorized by law, the purported determination of prevailing minimum wages in the Iron and Steel Industry issued under date of January 16, 1939, by the defendant Charles V. McLaughlin, as Acting Secretary of Labor; and

(b) restraining and enjoining the defendants Henry Morgenthau, Jr., Christian Joy Peoples, Claude Augustus Swanson, Harry Hines Woodring, Harold L. Ickes and James A. Farley, and each of them, individually and in their respective official capacities above set forth, their and each of their officers, agents, assistants, employ-
27 ees, representatives and attorneys, and any one associated with or acting in concert or participation with them or any of them, and their successors in office, and each of them, and their officers, agents, assistants, employees, representatives and attorneys, and any one associated with or acting in concert or participation with them or any of them, and each of them, from (i) inserting or causing or requiring or permitting to be inserted in any invitation to bid on any public contract, or in any advertisement for bids on any such contract, or in the specifications for any such contract, or in any bid on any such contract, or in any required form for any such bid, or in any such contract, any stipulation or representation that any person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles or equipment used in the performance of the contract will be paid, without subsequent deduction or repayment on any account, or otherwise, not less than the minimum wages set forth in the purported determination of prevailing minimum wages in the Iron and Steel Industry issued under date of January 16, 1939, by the defendant Charles V. McLaughlin, as Acting Secretary of Labor, or any stipulation or representation of like purport or effect, and (ii) inserting or causing or requiring or permitting to be inserted in any invitation to bid on any public contract for the manufacture or furnishing of any iron or steel product or any product of the Iron and Steel Industry (as defined in said purported determination), or in any advertisement for bids on any such contract, or in the specifications for any such contract, or in any bid on any such contract, or in any required form for any such bid, or in any such contract, the following stipulation or representation:

"All persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any

account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under the contract: *Provided, however*, That this stipulation with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor."

or any stipulation or representation of like purport or effect.

2. That this Honorable Court issue its order, directed to the defendants, and each of them, to show cause, if any they have, at a convenient day to be fixed by this Honorable Court, why a preliminary injunction should not be granted restraining all and each of the defendants during the pendency of this action, pursuant to the prayers of this complaint and particularly paragraph 3 thereof.

3. That this Honorable Court grant and issue a preliminary injunction

(a) restraining and enjoining, pending final determination of this cause, the defendants Frances Perkins, Charles V. McLaughlin and L. Metcalfe Walling, and each
28 of them, individually and in their respective official capacities above set forth, their and each of their officers, agents, assistants, employees, representatives and attorneys, and any one associated with or acting in concert or participation with them or any of them, and their successors in office, and each of them, and their officers, agents, assistants, employees, representatives and attorneys, and any one associated with or acting in concert or participation with them or any of them, and each of them, from causing or permitting to become effective, and from promulgating, publishing or holding out, or causing or permitting to be promulgated, published or held out, as effective or valid or authorized by law, the purported determination of prevailing minimum wages in the Iron and Steel Industry issued under date of January 16, 1939, by the defendant Charles V. McLaughlin, as Acting Secretary of Labor; and

(b) restraining and enjoining, pending final determination of this cause, the defendants Henry Morgenthau, Jr., Christian Joy Peoples, Claude Augustus Swanson, Harry Hines Woodring, Harold L. Ickes and James A. Farley, and each of them, individually and in their respective official capacities above set forth, their and each of their officers, agents, assistants, employees, representatives and attorneys, and any one associated with or acting in concert or participation with them or any of them; and their successors in office, and each of them, and their officers, agents, assistants, employees, representatives and attorneys, and any one associated with or acting in concert or participation with them or any of them, and each of them, from (i) inserting or causing or requiring or permitting to be inserted in any invitation to bid on any public contract, or in any advertisement for bids on any such contract, or in the specifications for any such contract, or in any bid on any such contract, or in any required form for any such bid, or in any such contract, any stipulation or representation that any person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles or equipment used in the performance of the contract will be paid, without subsequent deduction or repayment on any account, or otherwise, not less than the minimum wages set forth in the purported determination of prevailing minimum wages in the Iron and Steel Industry issued under date of January 16, 1939, by the defendant Charles V. McLaughlin, purporting to act as Acting Secretary of Labor, or any stipulation of like purport or effect, and (ii) inserting or causing or requiring or permitting to be inserted in any invitation to bid on any public contract for the manufacture or furnishing of any iron or steel product or any product of the Iron and Steel Industry (as defined in said purported determination), or in any advertisement for bids on any such contract, or in the specifications for any such contract; or in any bid on any such contract, or in any required form for any such bid, or in any such contract, the following stipulation or representation:

"All persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any

29 account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under the contract: *Provided, however,* That this stipulation with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor."

or any stipulation or representation of like purport or effect.

4. That upon final hearing of this cause this Honorable Court grant, decree and issue a permanent injunction

(a) restraining and enjoining the defendants Frances Perkins, Charles V. McLaughlin and L. Metcalfe Walling, and each of them, individually and in their respective official capacities above set forth, their and each of their officers, agents, assistants, employees, representatives and attorneys, and any one associated with or acting in concert or participation with them or any of them, and their successors in office, and each of them, and their officers, agents, assistants, employees, representatives and attorneys, and any one associated with or acting in concert or participation with them or any of them, and each of them, from causing or permitting to become effective, and from promulgating, publishing or holding out, or causing or permitting to be promulgated, published or held out, as effective or valid or authorized by law, the purported determination of prevailing minimum wages in the Iron and Steel Industry issued under date of January 16, 1939, by the defendant Charles V. McLaughlin, as Acting Secretary of Labor; and

(b) ordering, commanding and directing the defendants Frances Perkins and Charles V. McLaughlin, and each of them, individually and in their respective official capacities above set forth, to withdraw, cancel and void the purported determination of prevailing minimum wages in the Iron and Steel Industry issued under date of January 16, 1939, by the defendant Charles V. McLaughlin, as Acting Secretary of Labor; and

(c) restraining and enjoining the defendants Henry Morgenthau, Jr., Christian Joy Peoples, Claude Augustus Swanson, Harry Hines Woodring, Harold L. Ickes and James A. Farley, and each of them, individually and in their respective official capacities above set forth, their and each of their officers, agents, assistants, employees, representatives and attorneys, and any one associated with or acting in concert or participation with them or any of them, and their successors in office, and each of them, and their officers, agents, assistants, employees, representatives and attorneys, and any one associated with or acting in concert or participation with them or any of them, and each of them, from (i) inserting or causing or requiring or permitting to be inserted in any invitation to bid on any public contract, or in any advertisement for bids on any such contract, or in the specifications for any such contract, or in any bid on any such contract, or in any required form for any such bid, or in any such contract, any stipulation or representation that any person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles or equipment used in the performance of the contract will be paid, without subsequent deduction or repayment on any account, or otherwise, not less than the minimum wages set forth in the purported determination of prevailing minimum wages in the Iron and Steel Industry issued under date of January 16, 1939, by the defendant Charles V. McLaughlin, purporting to act as Acting Secretary of Labor; or any stipulation of like purport or effect, and (ii) inserting or causing or requiring or permitting to be inserted in any invitation to bid on any public contract for the manufacture or furnishing of any iron or steel product or any product of the Iron and Steel Industry (as defined in said purported determination), or in any advertisement for bids on any such contract, or in the specifications for any such contract, or in any bid on any such contract, or in any required form for any such bid, or in any such contract, the following stipulation or representation:

"All persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any ac-

count, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under the contract: *Provided, however,* That this stipulation with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor."

or any stipulation or representation of like purport or effect.

5. That upon final hearing, this Honorable Court declare, and order, adjudge and decree, that the purported determination of prevailing minimum wages in the Iron and Steel Industry issued under date of January 16, 1939, by the defendant Charles V. McLaughlin, as Acting Secretary of Labor, is invalid and unauthorized in law.

31 6. That the plaintiffs may have such other and further relief in the premises as this Honorable Court shall deem just and proper.

O. MAX GARDNER,
Office & P. O. Address,
Woodward Building,
Washington, D. C.,
ROBERTS B. THOMAS,
Office & P. O. Address,
101 Park Avenue,
New York, N. Y.,
GARDNER, MORRISON & ROGERS,
Office & P. O. Address,
Woodward Building,
Washington, D. C.,
WEBSTER & GARSIDE,
Office & P. O. Address,
15 Broad Street,
New York, N. Y.,
HAUSE, EVANS, STOREY & LICK,
Office & P. O. Address,
Telegraph Building,
Harrisburg, Pa.,

COCK & MARKELL,
Office & P. O. Address,
First National Bank Building,
Baltimore, Maryland,
GEORGE WALTER WITNEY,
Office & P. O. Address,
Finance Building,
Philadelphia, Pa.,
Attorneys for Plaintiffs.

32 DISTRICT OF COLUMBIA—*ss.:*

Roberts B. Thomas, being first duly sworn, according to law, upon oath deposes and says:

I am a citizen of the United States, over 21 years of age, and a resident of the County of Nassau, State of New York, and am an attorney duly admitted to practice in all the courts of the State of New York, the Supreme Court of the United States and the United States Court of Appeals for the District of Columbia. I am attorney for the plaintiffs named in the foregoing complaint. All said plaintiffs are corporations and are absent from the District of Columbia. I have read the foregoing complaint and verily believe the facts stated therein to be true.

ROBERTS B. THOMAS

Subscribed and sworn to before me this 25th day of February, 1939.

J. ARTHUR LYNHAM
(Seal) *Notary Public, D. C.*

33 *Exhibit A.*

DEPARTMENT OF LABOR
DIVISION OF PUBLIC CONTRACTS
WASHINGTON

NOTICE OF HEARING BEFORE PUBLIC CONTRACTS BOARD

Monday, July 25, 1938, 10 a. m.

Conference Room B, Departmental Auditorium, 13th & Constitution Ave. Washington

The Public Contracts Board will hold a hearing at the place and on the date above-indicated, to take testimony

upon which findings of fact will be made to assist the Secretary of Labor in determining, pursuant to Section 1(b) of the Public Contracts Act*, the prevailing minimum wages in the Iron and Steel Industry.

At this hearing an opportunity to be heard, either in person or by duly appointed representatives, will be given to persons engaged in the above named industry, either as employees or as employers, to groups of such persons, and to others within the discretion of the Board. Briefs or telegraphic communications may be filed but they should be received by the Board on or before the hearing date. It is suggested that when it is convenient five copies of briefs be submitted. Employers appearing in person, or by representatives, or presenting briefs, should furnish the Board with the following essential data:

(1) Name of firm
(2) Plant address
(3) Total number of employees in plant
(4) Number of male employees
(5) Number of female employees
(6) Classification of employees by occupations, including number engaged in each operation
(7) Hourly wages in each operation with designation of applicable time period
(8) If paid on piece work basis, weekly earnings in each class of employees
(9) Hours worked per week

This outline of suggested data is not meant to exclude the submission of any other pertinent information which an employer may desire to submit.

Employees appearing at the hearing, either in person or by their representatives, or submitting briefs, should acquaint the Board with facts as to the wages now being paid in the industry.

Dated: July 11, 1938.

L. METCALFE WALLING,
Administrator.

*(49 Stat. 2036; 41 U. S. C. Sup. III 35.)

34 (541)

EXHIBIT B

U. S. Department of Labor
Washington

Division of Public Contracts

In the Matter of the Determination
of the Prevailing Minimum Wages in
the Iron and Steel Industry

Notice of Extension of Time to File Briefs

In view of requests which have been made for the text of the report of the Public Contracts Board in addition to the findings and recommendations which have already been served on interested parties I am enclosing herewith the full text and I am extending the period for filing briefs to December 10, 1938.

L. METCALFE WALLING
Administrator

Dated: November 19, 1938
Enclosure

35 Washington, D. C.
October 27, 1938

In the Matter of Prevailing Minimum Wages in the Iron and Steel Industry Pursuant to Section 1(b) of the Act of June 30, 1936, Public Act No. 846, 74th Congress

Findings of Fact, Conclusions, and Recommendation in the Above-Entitled Matter by the Public Contracts Board for the Consideration of the Secretary of Labor
Written by Thomas Holland

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37 *Findings of Fact and Recommendation of the Public Contracts Board in the Matter of Prevailing Minimum Wages in the Iron and Steel Industry*

I

A public hearing in the above-entitled matter was held before the Public Contracts Board on July 25 and 26, 1938. Notice of this hearing (Exhibit A), dated July 11, 1938, was given to 511 companies, members of the iron and steel industry and of closely allied industries. Thirty-two trade associations, including the American Iron and Steel Institute, and 13 trade publications for the iron and steel and related industries were given notice of the hearing.

Notice of the hearing was given the chairman and the secretary of the Steel Workers' Organizing Committee and to officials of the Amalgamated Association of Iron, Steel and Tin Workers of America. Officials of the American Federation of Labor were notified as were several of the international unions affiliated with the American Federation of Labor. A number of Federal and State government officials and other parties interested in the proceedings were also sent notices. The complete list of parties notified of the hearing has been made a part of the record as Exhibit B.

Representatives of industry and labor gave testimony before the Board with respect to the questions at issue and numerous exhibits containing wage data and other information were also made a part of the record. Testimony was given and exhibits were offered for the record by representatives of the Bureau of Labor Statistics and the Public Contracts Division.

Appearances were entered at the hearing before the Board for the following companies, trade associations and labor organizations:

The Amalgamated Association of Iron, Steel & Tin Workers of America, Pittsburgh, Pa.
American Federation of Labor, Washington, D. C.
Andrews Steel Comp. ny, Newport, Kentucky
Bethlehem Steel Company, Bethlehem, Pa.
Bricklayers International Union, Washington, D. C.
The Carpenter Steel Company, Reading
Central Iron & Steel Company, Harrisburg, Pa.

Cohoes Rolling Mill Company, Cohoes, New York
Columbia Steel & Shafting Company, Pittsburgh, Pa.
Committee for Industrial Organization, Washington, D. C.
Crucible Steel Company of America, New York City
Henry Disston & Sons, Inc., Philadelphia
The Eastern Rolling Mill Company, Baltimore
Granite City Steel Company, Granite City, Illinois
38 Harrisburg Steel Corporation, Harrisburg
Inland Steel Company, Chicago
Jones & Laughlin Steel Corporation, Pittsburgh
Lukens Steel Company, Coatesville, Pennsylvania
Machinery & Allied Products Institute, Chicago
National Steel Corporation, Pittsburgh
Rail Steel Bar Association, Chicago:

Connors Steel Co., Birmingham
Calumet Steel Co., Chicago
Franklin Steel Works, Franklin, Pa.
Missouri Rolling Mill Corp., St. Louis
Knoxville Iron Co., Knoxville, Tenn.
Pollack Steel Co., Marion, Ohio
Eckels-Nye Steel Co., Syracuse
Buffalo Steel Co., Tonawanda, N. Y.
Sweet's Steel Co., Williamsport, Pa.
Texas Steel Co., Ft. Worth
West Virginia Rail Co., Huntington

Republic Steel Corporation, Cleveland
Sharon Steel Corporation, Sharon
Sloss-Sheffield Steel & Iron Company, Birmingham
South Chester Tube Company, Chester
Steel Founders Society of America, Cleveland
Steel Plate Fabricators Association, Chicago
Steel Workers' Organizing Committee, Pittsburgh
U. S. Steel Corporation of Delaware, Pittsburgh:

American Steel & Wire Co.
Carnegie-Illinois Steel Corp.
Columbia Steel Co.
National Tube Co.
Tennessee Coal, Iron & Railroad Co.

Vanadium-Alloys Steel Company, Pittsburgh
Wheeling Steel Corporation, Wheeling
The Youngstown Sheet & Tube Company, Youngstown

During the hearing and immediately thereafter the Board received from members of industry not represented at the hearing a number of letters, telegrams, and briefs containing wage data and other information relevant to these proceedings. These letters, telegrams and briefs, submitted by the following parties, have been incorporated in the public record:

The Aetna-Standard Engineering Co., Youngstown, Ohio
The American Rolling Mill Co., Middletown, Ohio
The American Tube & Stamping Plant, Bridgeport, Conn.
Apollo Steel Co., Apollo, Pa.
Atlantic Iron Works Co., Inc., Norfolk, Va.
Bristol Steel & Iron Works, Inc., Bristol, Va.-Tenn.
Buckeye Rolling Mill Co., Wheeling, W. Va.
The Burden Iron Co., Troy, N. Y.
Chateaugay Ore & Iron Co., Lyon Mountain, N. Y.
Chicago Bridge & Iron Co., Chicago, Ill.
Enterprise Wheel & Car Corp., Bristol, Tenn.-Va.
Glamorgan Pipe & Foundry Co., Lynchburg, Va.
Granite City Steel Co., Granite City, Ill.
Illinois Mfrs. Assn., Chicago, Ill.
Kalamazoo Foundry & Machine Co., Kalamazoo, Mich.
Keystone Drawn Steel Co., Spring City, Pa.
39 Kilby Steel Co., Anniston, Ala.
E. J. Lavino & Co., Philadelphia, Pa.
Lynchburg, Virginia, Chamber of Commerce
Lynchburg Foundry Co., Lynchburg, Va.
McInnes Steel Co., Corry, Pa.
The Midvale Co., Philadelphia, Pa.
The Milton Mfg. Co., Milton, Pa.
National Bearing Metals Corp., Portsmouth, Va.
Old Dominion Iron & Steel Works, Richmond, Va.
Phoenix Iron Co., Phoenixville, Pa.
Pine Iron Works, Co., Pine Forge, Pa.
Pittsburgh Steel Co., Pittsburgh, Pa.
Poor & Co., Inc., New York City
George W. Prentiss & Co., Holyoke, Mass.
Richmond Engineering Co., Richmond, Va.
Roanoke, Virginia, Chamber of Commerce

Roanoke Iron & Bridge Works, Inc., Roanoke, Va.
Roanoke Iron Works, Inc., Roanoke, Va.
Ross Structural Iron Works, Inc., Richmond, Va.
Rustless Iron & Steel Corp., Baltimore, Md.
Sheffield Steel Corp., Kansas City, Mo.
Simonds Saw & Steel Co., Lockport, N. Y.
Southern Assn. of Ornamental Metal Mfrs., Washington, D. C.
Troy Furnace Corp., Troy, N. Y.
Ulster Iron Works, Dover, N. J.
Virginia Bridge Co., Roanoke, Va.
Virginia Manufacturers Association, Richmond, Va.
Virginia Metal Mfg. Co., Roanoke, Va.
Walker Machine & Foundry Corp., Roanoke, Va.
The Wallingford Steel Co., Wallingford, Conn.
Wilson Steel & Wire Co., Chicago, Ill.
Alan Wood Steel Co., Conshohocken, Pa.
Woodward Iron Co., Woodward, Ala.
G. F. Wright Steel & Wire Co., Worcester, Mass.
Wrought Iron Co., Lebanon, Pa.

Subsequent to the hearing, a notice, dated July 29, 1938, was sent to those companies listed in Exhibit B from which no reports were received in response to the original notice of hearing, informing such companies that the record would be held open until August 8, 1938 for the submission of wage data and other information with respect to prevailing minimum wages in the iron and steel industry. Responses in the form of letters, telegrams and briefs were received to the second notice from the following companies and were made a part of the public record:

Acme Steel & Malleable Iron Works, Buffalo, N. Y.
American Car & Foundry Co., Berwick, Pa.
American Steel Co., Pittsburgh, Pa.
The Atlantic Wire Co., Branford, Conn.
The Baldwin Locomotive Works, Philadelphia, Pa.
Baldwin-Southwark Corp., Philadelphia, Pa.
Braeburn Alloy Steel Corp., Braeburn, Pa.
The E. & G. Brooke Iron Co., Birdsboro, Pa.
Buffalo Bolt Co., N. Tonawanda, N. Y.
Chicago Steel Foundry Co., Chicago, Ill.
Consolidated Steel Corp., Ltd., Los Angeles, Calif.

Continental Steel Corp., Kokomo, Ind.
Chapman Price Steel Co., Indianapolis, Ind.
Detroit Seamless Steel Tubes Co., Detroit, Mich.
Detroit Steel Corp., Detroit, Mich.
Ellwood Ivin's Steel Tube Works, Philadelphia, Pa.
Empire Finished Steel Corp., Newark, N. J.
Erie Forge Co., Erie, Pa.
Erie Forge & Steel Co., Erie, Pa.
Firth-Sterling Steel Co., McKeesport, Pa.
The Fitzsimmons Co., Youngstown, Ohio
Gardner-Denver Co., Quincy, Ill.
Globe Iron Co., Jackson, Ohio
Graver Tank & Mfg. Co., Inc., Catasauqua, Pa.
Hamilton Coke & Iron Division of the American Rolling Mill Co., Hamilton, Ohio
Heppenstall Co., Pittsburgh, Pa.
Industrial Brownhoist Corp., Bay City, Mich.
Jenifer Iron Co., Jenifer, Ala.
Johnson Steel & Wire Co., Worcester, Mass.
Judson Pacific Co., San Francisco, Calif.
Kensington Steel Co., Chicago, Ill.
Laclede Steel Co., St. Louis, Mo.
Latrobe Electric Steel Co., Latrobe, Pa.
Logan Iron & Steel Co., Burnham, Pa.
Los Angeles Steel Casting Co., Ltd., Los Angeles, Calif.
John Mohr & Sons, Chicago, Ill.
Molybdenum Corp. of America, Washington, Pa.
Newberry Lumber & Chemical Co., Newberry, Mich.
The Parkersburg Iron & Steel Co., Pittsburgh, Pa.
Pettibone Mulliken Corp., Chicago, Ill.
Phoenix Mfg. Co., Catasauqua, Pa.
Pittsburgh Tube Co., Pittsburgh, Pa.
Reed Foundry & Machine Co., Kalamazoo, Mich.
Reeves Steel & Mfg. Co., Dover, Ohio
Salem Engineering Co., Salem, Ohio
Sellers Mfg. Co., Chicago, Ill.
Southern Ferro Alloys Co., Chattanooga, Tenn.
Standard Brake Shoe & Foundry Co., Pine Bluff, Ark.
The Stanley Works, New Britain, Conn.
The Superior Sheet Steel Co., Canton, Ohio
Swedish Crucible Steel Co., Detroit, Mich.

Tonawanda Electric Steel Casting Corp., N. Tonawanda, N. Y.
Tonawanda Iron Corp., N. Tonawanda, N. Y.
The Treaty Co., Greenville, Ohio
The Tredegar Co., Richmond, Va.
Tremont Nail Co., Wareham, Mass.
Union Iron Works, Spokane, Wash.
Vulcan Mold & Iron Co., Latrobe, Pa.
The Walworth Co., New York City
Worcester Pressed Steel Co., Worcester, Mass.
Worth Steel Co., Claymont, Del.

Time for the submission of final briefs was allowed to all interested parties until August 22, 1938. Several final briefs analyzing the evidence and offering arguments in support of particular views have been received and are incorporated in the record. On August 22nd the record was regarded as complete and no further additions have been made.

The Board, in making its findings of fact in this matter, has relied upon the testimony received at the public hearing, the exhibits made a part of the record at the time of the hearing and such letters, telegrams, and briefs as have been made a part of the record in the manner stated above. Citations of the record in the following pages refer to the official transcript made by Ward and Paul, Washington, D. C.

41 II

In order to define the iron and steel industry for the purposes of these proceedings, members of industry and representatives of labor were asked to express their opinions as to the proper definition of the industry. It has been suggested that the definition to be used in these proceedings be the same as the definition used in the Code of Fair Competition for the iron and steel industry.

The representative of the United States Steel Corporation said, "It is my view generally that the broad designations as found in the Code are appropriately applicable to a proper definition of the iron and steel industry for the purposes that you gentlemen are considering it" (R 309). In the brief of the Inland Steel Company the follow-

ing recommendation is made: "It is recommended that the iron and steel industry shall be defined in the same manner as in the Code of Fair Competition for the iron and steel industry under the NIRA" (R 634).

The representative of the Republic Steel Corporation said, "The definition used by the Code authority was considered to be a pretty good definition and was worked out carefully at the time" (R. 318). The following statement is taken from the brief of the Andrews Steel Company: "The Code of Fair Competition in the iron and steel industry under the National Recovery Act used what has been considered a very comprehensive and reasonable description of the steel industry and it would seem fair to use the same description in determining the employees who will be recognized as members of the industry" (R 991).

Mr. Phillip Murray, the chairman of the Steel Workers' Organizing Committee, made the following statement: "I desire to recommend that the industry to be included should be limited to blast furnace products, steel works and rolling mill products, wire, wrought pipe and tin plate and terneplate" (R 62). Mr. Lee Pressman, General Counsel for the Committee for Industrial Organization, said, "I would like to state for the record that as far as the Steel Workers' Organizing Committee is concerned, the definition contained in that Code for limiting the industry would be perfectly satisfactory" (R 217). In the brief of the Steel Workers' Organizing Committee the following statement is made: "It was conceded by all interested parties who attended the public hearing that the definition of the iron and steel industry, as contained in the Code of Fair Competition for such industry under the National Industrial Recovery Act, is a fair description of the industry to be covered by the determination in this matter. The Steel Workers' Organizing Committee confirms such understanding and supports such definition" (R. 1393).

We agree with the views expressed by the representatives of industry and labor suggesting that the Code definition may properly be used to define and limit the scope of the present proceedings.

The industry, as the term is defined in Article I, sections 3 and 4 of the Amendment to Code of Fair Competition for

the iron and steel industry (Exhibit M), meant the business of producing and selling certain products which are set forth in the Code as follows:

Axles—rolled or forged
Bale ties—single loop
Bars—alloy steel, hot rolled
Bars—cold finished, carbon and alloy
42 Bars—concrete reinforcing, straight lengths
Bars, ingots, blooms and billets—iron
Bars—merchant steel
Bars—tool steel
Ferro-manganese and spiegeleisen
Girder rails and splice bars therefor
Ingots, blooms, billets and slabs—alloy
Ingots, blooms, billets and slabs—carbon
Light rails—60 pounds or less per yard—and splice bars and angle bars therefor
Standard tee rails of more than 60 pounds per yard—and angle bars and rail joints therefor, or any of such products
Mechanical tubing
Pig iron—foundry, high silicon silvery, malleable, open hearth basic, Bessemer and high silicon Bessemer
Pig iron—low phosphorus
Pipe—standard, line pipe and oil country tubular products
Plates
Posts—fence and sign
Railroad tie plates
Railroad track spikes
Sheet bars
Sheets
Skelp
Steel sheet piling
Strip steel—cold rolled
Strip steel—hot rolled
Structural shapes
Tin plate, tin mill black plate and terne plate
Tubes—boiler
Tube rounds
Wheels—car, rolled steel

Wire—drawn
Wire hoops—twisted or welded
Wire nails and staples, twisted barbless wire, barbed wire, twisted wire fence stays and wire fencing (except chain-link fencing)
Wire rods
Wire—spring
Wire—telephone

There is only one qualification to our acceptance of the definition used in the Code. No purchases of tin plate, tin mill black plate and terneplate have been made by the Government subject to the provisions of the Public Contracts Act (R 28). The wages paid for the production of these products present, in certain aspects, factors which are not found in the production of the other products. Further study of these wages will be necessary and since the problem is not one of immediate concern for Government purchases, we have eliminated the production of tin plate, tin mill black plate and terneplate from the scope of the present proceedings.

The products as set forth above as qualified should serve to limit the scope of the findings in these proceedings and the term "iron and steel industry" as used here is meant to be synonymous with the production and sale of such products.

A request was made at the hearing on behalf of the Machinery and Allied Products Institute that a definition of the iron and steel industry used in these proceedings
43 be qualified "to the effect that there shall not be included in the iron and steel industry blast furnace operations carried on as a part of the processes of production of the products included within another industry" (R 206) and "to the effect that there shall not be included in the iron and steel industry the operation of open hearth or electric furnaces for the conversion of pig iron and scrap into steel when carried on by employees within another industry as a part of the production processes of the products of such other industry" (R 206).

In the practical application of a definition of the iron and steel industry to Government purchases subject to the Public Contracts Act, the companies that use their iron

and steel products for subsequent fabrication are automatically excluded because the products which they would sell to the Government would not be iron and steel products as defined but, rather, products fabricated from iron and steel. Unless these companies sell to the Government the products of the iron and steel industry as they are set forth in the Code definition, they would not come within the terms of the definition which is being used in these proceedings. Thus, the qualifications of the definition requested by the Machinery and Allied Products Institute are implicit in the Code definition as it would be given application under the Public Contracts Act.

44

III

The evidence in the record leads us to the conclusion that the proper basis or foundation for findings with respect to the minimum wages prevailing in the iron and steel industry are the base rates paid to the workers classified as common laborers. We have made use of the definition of common laborer as it has been formulated by the Bureau of Labor Statistics. By this definition a common laborer is "one who performs physical or manual labor of a general character and simple nature, requiring no special training, judgment, nor skill" (R. 51). The customary practice in the iron and steel industry is to pay these common laborers wages that are known in the industry as base rates and it is the general practice in the industry to pay the base or entrance rate to the worker as long as he continues to be employed at common labor (R. 125, 223, 348, 440).

The workers classified as common laborers constitute a substantially large proportion of all the workers engaged in the industry. While the proportion varies from plant to plant and among the various producing centers throughout the industry, an analysis of the wage data submitted for the record in these proceedings and presented below in section 4 shows that the 26,887 workers classified as common laborers by the reporting iron and steel companies constitute 8.6 per cent of the total of 313,064 workers reported by these companies.

The proportion of common labor to the total number of workers reported by the iron and steel companies is shown in the following table for each of the producing states:

State	Proportion of common labor to total workers reported (per cent)
United States	8.6
Alabama	14.0
California	4.6
Connecticut	7.2
Delaware	7.5
Illinois	10.0
Indiana	8.6
Kentucky	14.6
Maryland	9.6
Massachusetts	5.9
Michigan	8.0
Minnesota	7.4
Missouri	12.9
New Jersey	14.3
New York	11.2
Ohio	5.9
Oklahoma	20.4
Pennsylvania	7.5
Utah	10.2
Virginia	32.9
Washington	3.9
West Virginia	16.3

The above table shows that, despite variations by states, for the industry as a whole there is a considerable number of workers classified as common laborers and we feel that there is a sufficient number to constitute the base or the foundation upon which to rest our findings as to the minimum wages prevailing in this industry. Moreover, the common labor classification is the largest occupational grouping to be found in the lower end of the industry's wage scale (R. 333, 359, 393). As an illustration, the Sheffield Steel Corporation in its Kansas City, Missouri plant pays 217 workers the base rate for common labor. Fifty-one workers are paid the next higher rate, and above that the numbers receiving the next higher rates are 78, 163, 105, and 22 (Exhibit C-1). The Granite City Steel Company reports that it has 297 workers receiving the base rate and that between the base rate of 58.5 cents an hour and other wage rates up to 62.5 cents an hour there is a total of 142 workers receiving such rates (R. 704). The South Chester Tube Company has reported that 113 workers receive the base rate of 56.5 cents an hour and that 145 receive this base rate with piece work pay extra. From 57 to 62.5 cents an hour there are 36 workers and at 63 cents an hour, 136 workers (R. 742).

The base rate for common labor in the industry is substantially a rock bottom rate, that is to say, there is not to be found any extensive grouping of workers at wages below the base rates (R. 129, 176, 223, 305, 315, 332, 347, 354, 400, 439, 616, 621). An examination of the data in the record shows that there are classifications of workers in the industry receiving wages below the base rates for common labor. These are not sufficient to detract from the importance of the common labor classification as the proper foundation for our findings of prevailing minimum wages, and we have given consideration to these wages below the basic minimum category in section VII below.

The base rates paid to common labor are important in the industry not only because of the relative size of the common labor classification but also because of the key position of the base rates in relation to the wage rates paid in other occupations in the industry. A letter from the Central Iron and Steel Company states that: "The entire wage structure of our plant is based on the basic or common labor rate" (R 758). In the brief of the Youngstown Sheet and Tube Company, the statement is made that: "In the evolution of rates of pay for the multifarious kinds of labor the basic wage rate for common labor always is used as the base or starting point and from such base rate the specific rates for the multifarious employments are developed" (R 443).

The Crucible Steel Company says in its brief that: "The entire wage structure for common labor, semi-skilled and skilled occupations is predicated on the base rate for common labor" (R 451). A letter from Henry Disston and Sons states that: "It will be realized that the common or unskilled labor rate is the basis of any hourly wage structure in a plant and that changes in this rate must eventually be reflected in the rates above the common labor rate" (R 708). The Andrews Steel brief refers to "the minimum wage rates paid to that class of labor known as 'common labor' which, according to long-established usage, receives the minimum hourly wage rates paid for employment in the steel industry" (R 900).

The Inland Steel Company's brief makes the statement that: "The wage structure for hourly-paid employees is built upon the basic common labor rate, and, except for minor adjustments to meet changing conditions, all other

rates for hourly-paid employees will vary with the basic common labor rate" (R 637). The George W. Prentiss Company in a letter states that: "Skilled and supervisory pay is largely determined by the base rate paid unskilled labor" (R 272). In its brief the Bethlehem Steel Company says, "It is also a matter of common knowledge that the wage rate of common laborers in the steel industry is a basic wage rate to which the wage rates of semi-skilled and skilled workmen in the industry bear a definite relation" (R 1250). Referring to the base rate for common labor the brief of the Wheeling Steel Corporation says, "this rate is the foundation of the wage structure and all other rates are rather definitely related to it" (R 632). Mr. Parker, representing the Carpenter Steel Company, testified that "any changes made in the existing rates of common labor will affect all those in the higher brackets" (R. 366).

From these quotations it is apparent that the base rates for common labor occupy an especially important and key position in the whole wage scale of the industry. It is clear from the evidence that the members of the industry regard the common labor classification as the proper foundation for finding the prevailing minimum wages in the industry.

Mr. Murray, speaking for the Steel Workers' Organizing Committee, said, "I also wish to recommend that such prevailing minimum wage be limited to that for common labor" (R 63).

In view of the evidence that the common labor classification accounts for a substantial proportion of all the workers in the industry, that it is the largest occupational grouping in the lower portion of the industry's wage scale, and that the base rate is substantially a rock bottom wage, we have taken the base rates as the foundation for our findings of prevailing minimum wages. We have also given weight to the fact that the members of the industry regard the base rate for common labor as a key wage and, further, that members of the industry and representatives of the Steel Workers' Organizing Committee have specifically recommended the adoption of the common labor classification as the foundation for these proceedings.

IV

47 The prevailing minimum wages in the iron and steel industry, as in any industry, must be derived from current information about the minimum wages being paid in the industry and the number of workers to whom these wages are paid. In response to the notice of hearing wage data were reported to the Board by members of the iron and steel industry and by representatives of organized labor in the industry. In a few instances wage data were received from establishments not a part of the iron and steel industry. We present in this section in summary form all of the wage data received by the Board.

The table below gives the names of the reporting companies in alphabetical order. The locations of the plants reported by the companies are also given. For each of the plants is given the total number of employees in the plant as reported by the company operating the plant. In most instances the totals so reported include only productive workers but in some reports all employees in the plant are included. It has not been possible to determine the number of non-productive workers so reported with any degree of precision but it may be stated that the proportion included is very small and that the figures on total plant employment, in almost every instance, give only the productive workers in the plant. Included in the summary below is the number of workers in each reported plant being paid the base rate for common labor. Also included in another column is the base rate being paid in each reported plant. The last column in the table gives the base rate reported by the Steel Workers' Organizing Committee, in those cases where the union has reported a collective agreement to be in force in a plant.

Name of Company	Location of Plant	Total number of workers in plant	Number of workers in plant paid base rate for common labor	Base rate in plant for common labor as reported by employer (cents per hour)	Base rate in plant having union agreement as reported by S.W.O.C. (cents per hour)
Acme Steel & Malleable Iron Works	Buffalo, N. Y.	231	75	.58	
Aetna Standard Engineering Co.	Warren, Ohio	109	31	.625	
Aetna Standard Engineering Co.	Ellwood City, Pa.	84	10	.625	
Allegheny Steel Co.	Brackenridge, Pa.)				
Allegheny Steel Co.	West Leechburg, Pa.)				.625
American Car & Foundry Co.	Berwick, Pa.	135	24	.48	
American Rolling Mill Co.	Columbus, Middletown and Zanesville, Ohio; Ashland, Ky.; and Butler, Pa.	8,509	337	.625	
American Steel Co.	Pittsburgh, Pa.	5			
American Steel & Wire Co.	Chicago District:				
	Anderson, Ind.	81	12	.60	.60
	DeKalb, Ill.	225	4	.60	.60
	Joliet, Ill.	1,244	80	.60	.60
	Waukegan, Ill.	1,430	20	.625	.625
American Steel & Wire Co.	Cleveland, Ohio	3,328	69	.625	.625
American Steel & Wire Co.	Duluth, Minn.	1,303	97	.60	.60

13. (continued)

American Steel & Wire Co.	Pittsburgh District:				
	Allentown, Pa.	713	23	.565	.565
	Donora, Pa.	2,804	134	.625	.625
	Rankin, Pa.	386	16	.625	.625
American Steel & Wire Co.	Worcester District:				
	New Haven, Conn.	460	8	.625	.625
	Trenton, N. J.	323	9	.625	.625
	Worcester, Mass.	2,819	98	.625	.625
American Tube & Stamping Co.	Bridgeport, Conn.	639	56	.55	
Andrews Steel Co.	Newport, Ky.	2,500	680	.56	.56
Apollo Steel Co.	Apollo, Pa.	1,000	60	.53	
The Atlantic Wire Co.	Branford, Conn.	130	13	.525	
Bethlehem Steel Co.	Bethlehem, Pa.	8,342	391	.565	
Bethlehem Steel Co.	Buffalo, N. Y.	6,853	603	.595	
Bethlehem Steel Co.	Coatesville, Pa.	325	44	.565	
Bethlehem Steel Co.	Danville, Pa.	243	52	.565	
Bethlehem Steel Co.	Johnstown, Pa.	7,649	515	.585	
Bethlehem Steel Co.	Lebanon, Pa.	654	129	.565	
Bethlehem Steel Co.	Los Angeles, Calif.	553	24	.58	
Bethlehem Steel Co.	San Francisco, Calif.	603	4	.60	
Bethlehem Steel Co.	Seattle, Wash.	434	17	.60	
Bethlehem Steel Co.	Sparrows Point, Md.	15,846	1,477	.565	

14. (continued)

Bethlehem Steel Co.	Steelton, Pa.	3,108	351	.565	
Bethlehem Steel Co.	Williamsport, Pa.	434	130	.565	
Braeburn Alloy Steel Corp.	Braeburn, Pa.	160	16	.625	.625
Bristol Steel & Iron Works, Inc.	Bristol, Va.-Tenn.	42	2	.30	
E. & G. Brooke Iron Co.	Birdsboro, Pa.	215	47	.54	
Buckeye Rolling Mill Co.	Newark, Ohio	53	23	.565	
Buffalo Bolt Co.	North Tonawanda, N. Y.	856	96	.60	
Buffalo Steel Co.	Tonawanda, N. Y.	178	110	.505	
Burden Iron Co.	Troy, N. Y.	300	60	.46	
Calumet Steel Co.	Chicago Heights, Ill.	470	62	.595	
Carnegie-Illinois Steel Corp.	Chicago District:				
	Elwood, Ind.	272	272	.595	.595
	Gary, Ind.	20,654	2,185	.625	.625
	Joliet, Ill.	50	7	.60	.60
	South Chicago, Ill.	8,507	948	.625	.625
Carnegie-Illinois Steel Corp.	Johnstown, Pa.	1,237	88	.585	.585
Carnegie-Illinois Steel Corp.	Pittsburgh District:				
	Bessemer, Pa.	1,767	113	.625	.625
	Cambridge, Ohio	30	17	.585	.585
	Canton, Ohio	216	28	.625	.625
	Clairton, Pa.	4,143	331	.625	.625
	Duquesne, Pa.	4,105	81	.625	.625
	Etna, Pa.	266	37	.625	.625
	Farrell, Pa.	3,304	146	.625	.625

(continued)

Carnegie-Illinois Steel Corp.	Irvin, Pa.	1,116	92	.625	.625
	McKeesport, Pa.	411	16	.625	.625
Carnegie-Illinois Steel Corp.	Pittsburgh District:				
	Martins Ferry, Ohio	1,473	78	.625	.625
	Mingo Junction, Ohio	1,175	151	.625	.625
	Morgantown, W. Va.	13	12	.56	.56
	Munhall, Pa.	8,767	386	.625	.625
	New Castle, Pa.	2,623	46	.625	.625
	Philadelphia, Pa.	58	20	.56	.56
	Scottdale, Pa.	8	7	.625	.625
	Vandergrift, Pa.	2,319	93	.625	.625
	Youngstown, Ohio	6,914	386	.625	.625
Carpenter Steel Co.,	Kenilworth, N. J.	45	0	.57	
Carpenter Steel Co.	Reading, Pa.	834	56	.57	
Central Iron & Steel Co.	Harrisburg, Pa.	1,210	153	.54	
Chapman Price Steel Co.,	Indianapolis, Ind.	393	32	.55	.55
Chateaugay Ore & Iron Co.	Lyon Mountain, N. Y.	103	18	.30	
Chicago Steel Foundry Co.	Chicago, Ill.	90	4	.50	
Cohoes Rolling Mill Co.	Cohoes, N. Y.	163	5	.42	
Columbia Steel Co.	Pittsburgh, Calif.	2,093	99	.60	.60
Columbia Steel Co.	San Francisco, Calif.	90	3	.65	.65
Columbia Steel Co.	Scranton, Utah	196	20	.60	.60
Columbia Steel Co.	Torrance, Calif.	942	68	.58	.58

(continued)

Connors Steel Co.	Birmingham, Ala. 1/				
Consolidated Steel Corp., Ltd.	Los Angeles, Calif.	502	52	.65	
Continental Steel Corp.	Kokomo and Indianapolis Ind.	2,063	129	.55	.55
Crucible Steel Co. of America:					
Park Works	Pittsburgh, Pa.	1,447	221	.625	.625
LaBelle Works	Pittsburgh, Pa.	609	139	.625	.625
Spring Works	Pittsburgh, Pa.	68	44	.625	.625
Pittsburgh Crucible Steel Co.	Pittsburgh, Pa.	2,199	153	.625	.625
National Drawn Steel Co., Inc.	Pittsburgh, Pa.	23	2	.625	.625
Atha Works	Harrison, N. J.	1,580	300	.565	.565
S. & J. Works	Jersey City, N. J.	335	18	.565	.565
Halcomb Works	Syracuse, N. Y.	1,103	54	.565	.565
Sanderson Works	Syracuse, N. Y.	553	229	.565	.565
Detroit Seamless Steel Tubes Co.	Dearborn, Mich.	193	8	.65	
Detroit Steel Corp.	Detroit, Mich.	222	64	.70	
Henry Disston & Sons, Inc.	Philadelphia, Pa.	310	30	.50	.50
Eastern Rolling Mill Co.	Baltimore, Md.	446	78	.53	.53
Eckels-Nye Steel Co.	Syracuse, N. Y. 2/	80	16	.485	
Ellwood Ivin's Steel Tube Works	Philadelphia, Pa.	24	5	.595	
Empire Finished Steel Corp.	Newark, N. J.	80	20	.45	
Enterprise Wheel & Car Corp.	Bristol, Tenn.-Va.	150	30	.38	

1/ This company is one of 3 Southern establishments which employ a total of 653 wage earners of which number 221 receive an average base rate of 34.5¢ per hour.

2/ Data approximated on the basis of information supplied by the Rail Steel Bar Assn.

(continued)

Erie Forge Co.	Erie, Pa.	241	3	.53	
Erie Forge & Steel Co.	Erie, Pa.	625	9	.53	
Firth-Sterling Steel Co.	McKeesport, Pa.	675	25	.625	.625
The Fitzsimmons Co.	Youngstown, Ohio	72	22	.625	
Franklin Steel Works	Franklin, Pa.	212	15	.50	
Gardner-Denver Co.	Quincy, Ill. 3/	917	198	.45	
Glamorgan Pipe & Foundry Co.	Lynchburg, Va.	180	38	.42	
Globe Iron Co.	Jackson, Ohio	162	25	.5625	
Granite City Steel Co.	Granite City, Ill.	2,089	297	.585	
Great Lakes Steel Corp., Hanna Furnace Div.	Delray, Mich.	337	74	.63	
Great Lakes Steel Corp., Great Lakes Div.	Ecorse, Mich.	4,089	186	.63	
Great Lakes Steel Corp., Michigan Steel Div.	Ecorse, Mich.	535	17	.63	
Hanna Furnace Corp.	Buffalo, N. Y.	395	45	.595	
Harrisburg Steel Corp.	Harrisburg, Pa.	779	35	.54	
Heppenstal Co.	Bridgeport, Conn.	175	24	.57	.57
Heppenstal Co.	Pittsburgh, Pa.	501	43	.635	.635

3/ Also operates plants in Missouri and Colorado; the data shown are composite for all operations.

(continued)

Industrial Brownhoist Corp.	Bay City, Mich.	448	0	.40	
Inland Steel Co.	Chicago Heights, Ill.	368	74	.595	
Inland Steel Co.	Indiana Harbor, Ind.	9,726	304	.625	
Jessop Steel Co.	Washington, Pa.				.625
Johnson Steel & Wire Co.	Worcester, Mass.	273	50	.55	
Jones & Laughlin Steel Corp.	Aliquippa, Pa.	9,247	573	.625	.625
Jones & Laughlin Steel Corp.	Pittsburgh, Pa.	6,843	1,313	.625	.625
Judson-Pacific Co.	Oakland & San Francisco, Calif.	70	2	.575	
Kalamazoo Foundry & Machine Co.	Kalamazoo, Mich. 4/	23	5	.50	
Kensington Steel Co.	Chicago, Ill.	105	6	.50	
Kilby Steel Co.	Anniston, Ala.	250		.36	
Knoxville Iron Co.	Knoxville, Tenn. 1/ (See p. 16)				
Laclede Steel Co.	Alton and Madison, Ill.	825	88	.565	
Latrobe Electric Steel Co.	Latrobe, Pa.	529	39	.625	.625
E. J. Lavino & Co.	Reusens, Va.	175	91	.43	
E. J. Lavino & Co.	Sheridan, Lebanon County, Pa.	180	95	.485	

4/ Base rate shown as from 40¢ to 50¢ per hour; the 50¢ figure is used because it appears to be more in keeping with the remainder of the wage structure.

19.

(continued)

Logan Iron & Steel Co.	Burnham, Pa.	165	38	.49	
Los Angeles Steel Casting Co.	Los Angeles, Calif.	158	54	.55	
Lukens Steel Co.	Coatesville, Pa.	1,640	230	.565	.565
Midvale Steel Co.	Philadelphia, Pa.	2,075	48	.57	
Milton Mfg. Co.	Milton, Pa.	345	6	.465	
John Mohr & Sons	Chicago, Ill.	37	0	.66	
Molybdenum Corp. of America	Washington, Pa.	74	15	.625	
National Bearing Metals Corp.	Portsmouth, Va.	63	21	.35	
National Tube Co.	Gary, Ind.	99	0	.625	.625
National Tube Co.	Lorain, Ohio	7,456	17	.625	.625
National Tube Co.	Ellwood City, Pa.	2,394	0	.625	.625
National Tube Co.	McKeesport, Pa.	3,334	1	.625	.625
Newberry Lumber & Chemical Co.	Newberry, Mich.	342	121	.38	
Old Dominion Iron & Steel Works	Richmond, Va.	100	25		
Otis Steel Co.	Cleveland, Ohio				.625
Parkersburg Iron & Steel Co.	Parkersburg, W. Va.	588	99	.50	
Pettibone Mulliken Corp.	Chicago, Ill.	614	24	.55	
Phoenix Iron Co.	Phoenixville, Pa.	1,200	58	.565	

(continued)

Pine Iron Works	Pine Forge, Pa.	52	19 5/	.43	
Pittsburgh Steel Co.	Pittsburgh, Pa.	5,189	430	.625	.625
Pittsburgh Tube Co.	Monaca, Pa.	193	2	.60	
Pollak Steel Co.	Marion, Ohio	335	23	.51	
Poor & Co., Inc. 6/	Troy, N. Y.	132	24	.52	
George W. Prentiss & Co.	Holyoke, Mass.	150	15	.55	
Reed Foundry & Machine Co.	Kalamazoo, Mich.	81	20	.561	
Reeves Steel & Mfg. Co.	Dover, Ohio	750	20	.605	
Republic Steel Corp.	Birmingham, Ala.	360	84	.40	
Republic Steel Corp.	Gadsden, Ala.	2,487	437	.365	
Republic Steel Corp.	Chicago, Ill.	1,238	109	.625	
Republic Steel Corp.	Moline, Ill.	139	8	.56	
Republic Steel Corp.	Monroe, Mich.	560	32	.625	
Republic Steel Corp.	Buffalo, N. Y.	1,338	59	.595	
Republic Steel Corp.	Canton and Massillon, Ohio	4,131	114	.625	
Republic Steel Corp.	Cleveland, Ohio	2,218	252	.625	

5/ Data are estimated from company correspondence.
6/ Reported for the Rail Joint Company.

(continued)

Republic Steel Corp.	Niles and Warren, O.	5,163	281	.625	
Republic Steel Corp.	Youngstown, Ohio	5,825	269	.625	
Republic Steel Corp.	Pittsburgh, Pa.	181	14	.625	
Richmond Engineering Co.	Richmond, Va.	100	33	.35	
Roanoke Iron & Bridge Works, Inc.	Roanoke, Va.	100		.35	
Roanoke Iron Works, Inc.	Roanoke, Va. 5/ (See p.20)	35	17	.35	
Ross Structural Iron Works, Inc.	Richmond, Va.	35 5/ (See p. 20)		.325	
Rotary Electric Steel Co.	Detroit, Mich.				.625
Rustless Iron & Steel Corp.	Baltimore, Md.	247	30	.54	
Salem Engineering Co.	Salem, Ohio	33			
Sharon Steel Corp.	Lowellville & Youngstown, Ohio & Sharon, Pa.	1,786	196	.625	.625
Sheffield Steel Corp.	Kansas City, Mo.	1,831	217	.55	
Sheffield Steel Corp.	St. Louis, Mo.	329	61	.55	
Sheffield Steel Corp.	Sand Springs, Okla.	186	38	.482	
Simonds Saw & Steel Co.	Lockport, N. Y.	368	49	.55	
Sloss-Sheffield Steel & Iron Co.	Birmingham, Ala.	423	44	.40	
South Chester Tube Co.	Chester, Pa.	614	113	.565	
Standard Brake Shoe & Foundry Co.	Pine Bluff, Ark.	201	96	.30	

(continued)

Superior Sheet Steel Co.	Canton, Ohio	700	14	.55	.55
Swedish Crucible Steel Co.	Detroit, Mich.	124	40	.65	
Sweet's Steel Co.	Williamsport, Pa.	263	99	.485	
Tennessee Coal, Iron & Railroad Co.	Bessemer, Ala.) Ensley, Ala.) Fairfield, Ala.) Pratt City, Ala.)	7,631	988	.45	.45
Texas Steel Co.	Fort Worth, Tex. 1/ (See p. 16)				
Timken Steel & Tube Co.	Canton, Gambrinus and Wooster, Ohio				.625
Tonawanda Electric Steel Casting Corp.	N. Tonawanda, N. Y.	13	5	.55	
Tonawanda Iron Corp.	N. Tonawanda, N. Y.	25	8	.595	
The Treaty Co.	Greenville, Ohio	35	12	.40	
The Tredegar Co.	Richmond, Va. 7/	458	125	.533	
Tremont Nail Co.	Wareham, Mass.	63	13	.495	
Troy Furnace Corp.	Troy, N. Y.	196	37	.50	
Ulster Iron Works	Dover, N. J.	250	35	5/(See p. 20) .50	
Union Iron Works	Spokane, Wash. 8/	145	30	.6125	

7/ The common labor rate shown for this company is the weighted average of several common labor rates.
8/ The figures shown here are averages. The company employs from 140 to 150 wage earners at base rate wages ranging from 60¢ to 62.5¢ per hour.

(continued)

Vulcan Mold & Iron Co.	Latrobe, Pa.	140	39	.625	
Wallingford Steel Co.	Wallingford, Conn.			.50	
Weirton Steel Co.	Steubenville, Ohio	1,015	186	.625	
Weirton Steel Co.	Weirton, W. Va.	8,080	1,136	.625	
West Virginia Rail Co.	Huntington, W. Va.	274	53	.52	
Wheeling Steel Corp. (6 plants)	4 in Ohio	13,727	1,546	.625	.625
	2 in W. Va.	3,132	671	.625	.625
Wilson Steel & Wire Co.	Chicago, Ill.	201	74	.625	
Alan Wood Steel Co.	Conshohocken, Pa.	1,379	255	.565	.565
Woodward Iron Co.	Woodward, Ala.	572	87	.40	.40
Worcester Pressed Steel Co.	Worcester, Mass.	100	17	.50	
Worth Steel Co.	Claymont, Del.	876	66	.57	
G. F. Wright Steel & Wire Co.	Worcester, Mass.	171	18	.58	
Wrought Iron Co.	Lebanon, Pa.	663	154	.465	
Youngstown Sheet & Tube Co.	Chicago District	5,130	321	.625	
Youngstown Sheet & Tube Co.	Youngstown District	9,808	349	.625	

V

For the most part the wage data given in the section above relate to a pay period during the month of July, 1938. Practically all of the data are for the summer of 1938. A few reports have been received for an earlier period but none go back beyond February, 1938. A small number of reports have been received for a pay period during August, 1938. The record offers us prevailing wage statistics in the sense that these statistics give us a view of the minimum wages in the industry currently being paid.

We have concluded from an analysis of the wage data summarized in section 4 above that the statistics in the record cover a substantial proportion of all the workers engaged in the industry during the summer of 1938 and that these wage data give us a large statistical sample. It is not essential nor is it customary that a wage survey of an industry include 100 per cent of the workers in the industry. The Bureau of Labor Statistics which makes wage surveys constantly, seldom, if ever, attempts to make its coverage of an industry 100 per cent complete. It is sufficient if a wage survey gives a sample large enough to display the characteristic features of the wage structure.

In the wage survey summarized in the section above a total of 99 iron and steel companies have submitted their wage data for the record. These companies operate a total of 234 iron and steel plants. In all, 313,064 workers are included in the wage data submitted by the iron and steel companies and of these 26,887 were reported to be classified as common laborers who are being paid the base rates for such work.

Although the report of the Census of Manufactures is not entirely satisfactory for purposes of comparison with the data above, we may take the latest report on the industry, made in 1935 (Exhibit I), as an indication of the coverage of the statistics in the record. The 1935 Census report for the industry reported the average number of wage earners employed in the manufacture of blast furnace products and steel works and rolling mill products to be 374,809 workers. In comparing the coverage of the data from the Census of Manufactures with the data in the record, allowance should be made for the fact that in 1935 the production of ingots

was 48.9 per cent of the ingot capacity of the industry. (R 644), whereas in the summer of 1938, at the time of the hearing, ingot production stood at approximately 36 per cent of capacity (R 122, 644). When allowance is made for the difference in rate of operations, it will be seen that the coverage of the statistics in the record is very nearly the same as the coverage of the Census of Manufactures in 1935.

Another and more satisfactory gauge to the coverage of the data reported in the record may be obtained from a comparison of the number of workers classified as common laborers and paid the base rates with the coverage of the latest survey made by the Bureau of Labor Statistics of entrance rates for common labor in the industry. (R 43, 52). In that survey the Bureau covered 39,649 common laborers working at entrance rates on July 1, 1937. Mr. Perlman, Chief of the Wages and Hours Division of the Bureau of Labor Statistics testified that the coverage of the Bureau's 1937 survey was unusually large (R 49), amounting to "between 80 and 85 percent of the total coverage of the industry" (R 58).

61 At the time the Bureau made this survey the industry was operating at an exceptionally active rate, estimated in terms of ingot production to be 89 or 90 percent of capacity in July, 1937 (R 124) and 72.3 percent of capacity for the year 1937 (R 644). When we take into consideration the fact that in the summer of 1938 the ratio of ingot production to capacity approximated 36 per cent, it will be seen that the number of common laborers covered by the wage sample in the record compares favorably with the 1937 survey of entrance rates for common labor made by the Bureau of Labor Statistics.

The most satisfactory method of appraising the adequacy and the representative nature of the wage statistics in the record is by comparing the capacity to produce the principal products of the industry of the plants reported in the record with the capacity of the plants for which no wage data have been reported. A comparison in terms of capacity to produce will bring out the features of a thoroughgoing wage survey. In addition to an adequate coverage of the total number of workers and common laborers employed in the industry the wage survey should be representative of the location of the plants in the industry, the

size of companies and plants, and the products of the industry. In the following pages in this section, on a state-by-state basis, the productive capacities of the reported plants will be compared with the productive capacities of the plants not reported, and this comparison should answer the question of the adequacy of the coverage of the wage sample in the record and the representative nature of this sample.

Before coming to the figures on capacity a preliminary word is necessary. A total of 511 companies was given notice of the hearing before the Board. These companies operate a total of 753 plants. The list of the companies notified of the hearing was made up principally from "The Directory of Iron and Steel Plants, 1938" (Exhibit B). This Directory is somewhat broader in its listing of companies in the iron and steel industry than is contemplated by the definition of the industry adopted here. It has been found that a substantial number of the companies notified of the hearing do not come within the purview of the iron and steel industry as defined above and consequently, these companies have not been considered by the Board as being a part of the industry as here defined. A few of the companies not regarded as being within the industry reported their wage data in response to the notice of hearing and such reports have been included above in the summary presented in section IV. These reports, however, are not considered in appraising the coverage and representative nature of the wage sample in the record, nor has weight been given these wage data in making our findings of the prevailing minimum wages for the industry. Where it has been decided that the companies to which notices of the hearing were sent but from which no replies were received are not within the definition of the industry as applied here, no weight has been given to them as non-reporting companies.

As a result of the exclusion from consideration of the companies which do not come within the definition of the industry used here, a total of 207 companies operating 292 plants have been dropped from consideration in the following pages. There have been considered as operating within the definition of the industry used here, as we have seen above, 99 companies operating 234 plants for which there

are reports in the record. The companies considered to be within the terms of the definition and to which the notice of the proceedings before the Board was sent number 304. These companies operate a total of 461 plants.

62 If we take the companies notified of these proceedings and within the purview of the definition we have for all intents and purposes the entire iron and steel industry. The comparison of the capacity to produce of the reported plants with the capacity to produce of the non-reported plants will measure with close approximation the adequacy of the wage data in terms of coverage and the representative nature of the data from the standpoint of location, size of company and plant, and product.

In view of the definition adopted here, the *Iron and Steel Works Directory*, 1935 (Exhibit B) will give us a broad view of the companies and plants which constitute the iron and steel industry. We have relied upon this Directory to give us the information concerning the productive capacity of the iron and steel works referred to in the remainder of this paragraph. In making use of these figures on capacity to produce, it is not our intention to make findings of fact with respect to the capacities of the plants to produce. We are using the capacity figures here simply as a means of measuring the adequacy of the wage survey contained in the record. Allowance should be made for omissions and errors, which no doubt are to be found in the following comparison of plant capacity. We believe, however, that the reported and non-reported plants together will give us a thoroughgoing view of the iron and steel industry.

The capacity figures below are given for each state in which there are iron and steel works. The figures are given for each plant except where the statistics are available only by company in a composite form. The location of each plant in the state is given and the name of the operating company. The annual capacity of each plant is given in tons for each product listed. The comparison of annual tonnage capacity is made for pig iron and ferro alloys, steel ingots and steel for castings, and finished hot rolled products. These are the principal products of the industry. In addition to these products a good many plants produce various kinds of specialty products. Where a plant

has capacity to produce only such specialty products its capacity is given in a footnote.

The plant location, company name and annual tonnage capacity are presented first for the plants which have had their wage data reported in the record. The same information is then given for the plants which have not been reported. A comparison of the reported and non-reported plants will show the relative capacity to produce accounted for by the plants for which we have reports in the record, and through such comparison we will be given a gauge to the adequacy of the wage data in terms of numbers of workers employed.

Between the two, the reported and non-reported plants will give us a view of the geographic distribution of the industry in the state. A comparison of the location of the reported and non-reported plants will show to what extent the reported plants are representative of the distribution of the industry throughout the state. From the comparison of plant capacity we may see to what extent our wage survey is representative of the large, medium and small-sized companies and plants in the state. Also the figures as to capacity will show the type of product produced in each plant and we will be able to appraise the representative nature of the survey in terms of type of product.

63 *Alabama*

Wage data for 14 plants located in Alabama have been received by the Board in response to the notices of these proceedings. The following table gives us the location, name, and the capacity to produce for each of the plants for wage data have been reported:

Location	Name of Company	Annual Tonnage Capacity		
		Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Anniston	Kilby Steel Co.		10,000	54,000
Birmingham	Republic Steel Corp.	320,000		
Birmingham (2 plants)	Sloss-Sheffield Steel & Iron Co.	584,000		
Birmingham (7 plants)	Tennessee Coal, Iron & Railroad Co.	1,604,000	1,802,000	1,336,800
Gadsden	Republic Steel Corp.	180,000	400,500	297,600
Woodward (2 plants)	Woodward Iron Co.	465,000		

No reports were received from companies operating the following 4 plants located in the State. Their location, name and productjve capacities are as follows:

Location	Name of Company	Annual Tonnage Capacity: Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Anniston	Swann Chemical Co.	23,360		
Birmingham	Connors Steel Co.			60,000
Holt	Central Iron & Coal Co.	126,000		
Jenifer	Jenifer Iron Co.[1]	12,000		

[1] Idle. Source: Report from company and *Iron and Steel Works Directory*, 1935.

The following table contrasts the capacity of the reported plants to produce the principal products with the total capacity of all plants in Alabama:

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	Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Total capacity of all plants:	3,314,360	2,212,500	1,748,400
Total capacity of reported plants:	3,153,000	2,212,500	1,688,400

It is not difficult to appraise the coverage of the wage data for Alabama. Almost the entire pig iron and hot rolled product capacity is accounted for by the reported plants and the ingot capacity is entirely included. The wage data for Alabama are complete in their coverage to a very high degree. The largest iron and steel company in the South, the Tennessee Coal, Iron and Railroad Company, has reported for its plants. The medium-sized plant of the Republic Steel Corporation is among the reported plants. The Birmingham pig iron producers have reported. A small steel company, the Kilby Steel Company, has reported its wage data. The only active plants not reported are two small pig iron producers and one small steel plant. Geographically, the important Birmingham center is almost fully reported on and there are also reports from the smaller producing centers located in smaller communities. We have no hesitancy in concluding that the wage survey for Alabama is more than adequate to give us a well rounded view of the number of workers employed, the location of the plants, the size of the companies and plants, and the nature of the product.

California

Wage data for 5 plants located in California have been received by the Board in response to the notices of these proceedings. The following table gives us the location, name, and the capacity to produce for each of the plants for which wage data have been reported:

Location	Name of Company	Annual Tonnage Capacity: Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Los Angeles	Pacific Coast Steel Co.[1]		85,000	66,500
Pittsburgh	Columbia Steel Co.		192,000	135,900
San Francisco	Columbia Steel Co.[2]			
San Francisco	Pacific Coast Steel Co.[1]		155,000	132,000
Torrance	Columbia Steel Co.		171,500	125,500

[1] Reported by the Bethlehem Steel Co.
[2] 13,280 tons wire and springs.

65 No reports were received from companies operating the following 4 plants located in the State. Their location, name and productive capacities are as follows:

Location	Name of Company	Annual Tonnage Capacity: Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Los Angeles	West Coast Pipe & Steel Co.[1]			
Oakland	California Wire Cloth Co.[2]			
Oakland	Judson Steel Corp.[3]		76,500	48,200
San Francisco	Simmons Co.[4]			10,000

[1] 12,000 tons pipe
[2] 3,000 tons wire
[3] A report has been received from the Judson-Pacific Co. of San Francisco which shows this company operating a plant at Oakland. Because of a doubt as to the proper applicability of the data submitted to the Oakland plant, the said plant is shown here as non-reported.
[4] Manufacturer of metal beds, bedroom furniture, etc.

The total ingot capacity for the State is 680,000 tons and of this amount the reported plants have 603,500 tons. The total hot rolled products capacity is 518,100 tons and of this amount the reported plants have 459,900 tons. No pig iron is produced in the State. The reported plants account for by far the largest portion of the State's capacity to produce the principal products of the industry, thus indicating the high coverage of the wage data. The industry in California is centered in the neighborhood of Los Angeles and San

Francisco. Two of the 3 plants in Los Angeles are reported and 3 of the 6 plants in San Francisco. The non-reported Los Angeles plant is a small producer of pipe. One of the non-reported San Francisco plants has a small wire-producing capacity. Another non-reported plant here apparently rolls steel for its own use in fabricating other products. The third San Francisco plant non-reported has a small ingot and rolling capacity.

All plants in California are small compared with plants in the East. Large companies, however, operate a majority of the plants. The Columbia Steel Company is a subsidiary of the U. S. Steel Corporation and the Pacific Coast Steel Company a subsidiary of the Bethlehem Steel Company. It is these companies that have reported their plants, and these plants are so representative and inclusive of the industry in California that we have no doubt as to the adequacy of the wage survey for California.

66 *Colorado*

No information was received from the Colorado Fuel & Iron Company in response to the notices given to it of these proceedings. This company accounts for the entire iron and steel capacity of the State. Its capacity to produce the principal products of the industry is as follows:

563,000 tons of pig iron
888,000 tons of steel ingots
663,500 tons of finished hot rolled products

This is an important company in the West and while no information has been received from it, the 1937 survey made by the Bureau of Labor Statistics includes Colorado (R 599) and from this we are able to make an inference with respect to the company's base rate for common labor

Connecticut

Wage data for 5 plants located in Connecticut have been received by the Board in response to the notices of these proceedings. The following table gives us the location, name, and the capacity to produce for each of the plants for which wage data have been reported:

Location	Name of Company	Annual Tonnage Capacity: Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Branford	Atlantic Wire Co.[1]			
Bridgeport	Heppenstal Co.[2]			
New Britain	The Stanley Works [3]		144,800	92,500
New Haven	American Steel & Wire Co.[4]			
Wallingford	Wallingford Steel Co.[5]			

[1] 22,500 tons wire
[2] 6,000 tons forgings
[3] 48,000 tons cold rolled strip. Also operates the American Tube & Stamping Company Division located at Bridgeport.
[4] 29,000 tons wire
[5] 20,400 tons cold rolled strip

No reports were received from companies operating the following 5 plants located in the State. Their location, name and productive capacities are as follows:

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Bridgeport	Bridgeport Screw Co.	10,000 tons wire
Bridgeport	Hazard Wire Rope Co.	14,400 tons wire
Bristol	Wallace Barnes Co.	6,000 tons cold rolled strip
Hartford	Union Drawn Steel Co.	51,600 tons cold drawn products
Shelton	Driscoll Wire Co.	8,000 tons wire

None of the plants which were not reported has capacity to produce pig iron, steel ingots, or finished hot rolled products. The only plant with capacity to produce any of these products is the Stanley Works which has reported. The other reported and non-reported works are engaged in the production of cold rolled and drawn products, forgings, and wire. The plants are all small. The only large company, The American Steel and Wire Company, has reported its wage data.

Apparently the data in the record for Connecticut is not exceptionally large in terms of numbers of workers covered but in view of the substantial portion of the State's capacity accounted for by the reported plants, we feel that the sample in the record is adequate, especially in view of its representative nature in terms of geographical location, size of plant and company, and nature of produet.

Delaware

Wage data for one plant located in Delaware have been received by the Board in response to the notices of these

proceedings. This plant accounts for the entire productive capacity of the industry in Delaware. Its name, location and capacity is as follows:

Worth Steel Co., Claymont—378,000 tons steel ingots
252,000 tons finished hot rolled products

Georgia

No information was received from the Atlantic Steel Company in response to the notices given to it of these proceedings. This company accounts for the entire iron and steel capacity of the State. Its capacity to produce the principal products of the industry is as follows:

137,040 tons of steel ingots
148,500 tons of finished hot rolled products

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Illinois

Wage data for 17 plants located in Illinois have been received by the Board in response to the notices of these proceedings. The following table gives us the location, name, and the capacity to produce for each of the plants for which wage data have been reported:

Location	Name of Company	Annual Tonnage Capacity		
		Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Alton	Laclede Steel Co.		235,400	128,550
Chicago	Wilson Steel & Wire Co.[1]			
Chicago	Youngstown Sheet & Tube Co.	602,400		
Chicago Heights	Calumet Steel Co.			50,000
Chicago Heights	Inland Steel Corp.			90,000
DeKalb	American Steel & Wire Co.[2]			
Evanston	Youngstown Sheet & Tube Co.[3]			
Granite City	Granite City Steel Co.		400,000	275,000
Joliet (3 plants)	American Steel & Wire Co.[4]			
Joliet	Carnegie-Illinois Steel Corp.	483,000	475,000	258,500
Madison	Laclede Steel Co.			103,000
Moline	Republic Steel Corp.			51,000
South Chicago	Carnegie-Illinois Steel Corp.	3,061,800	4,716,400	2,445,000
South Chicago	Republic Steel Corp.		408,000	321,000
Waukegan	American Steel & Wire Co.			225,000

[1] Capacity not given.
[2] 146,950 tons wire, 38,400 tons wire nails, and 31,250 tons wire fencing.
[3] 112,000 tons miscellaneous finished products.
[4] 360,700 tons wire and nails.

69 No reports were received from companies operating the following 23 plants located in the State. Their location, name and productive capacities are as follows:

Location	Name of Company	Annual Tonnage Capacity: Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Chicago and Riverdale	Acme Steel Co.			430,000
Chicago	Atchison, Topeka & Santa Fe Railroad Co.			7,500
Chicago	Chicago Steel & Wire Co.[1]			
"	A. Finkl & Sons [2]			
"	Illinois Nail Co.[3]			
"	Ingersoll Steel & Disc Co.			22,500
"	Interlake Iron Corp.	421,200		
"	International Harvester Co.	642,600	807,000	480,000
"	Joslyn Mfg. & Supply Co.			9,600
"	Clayton Mark & Co.[4]			
"	Sellers Mfg. Co.			150,000
"	Trojan Electric Steel Co.[5]		2,000	
"	Wyckoff Drawn Steel Co.[6]			
Chicago Heights	American Locomotive Co.		105,000	50,000
Chicago Heights	Columbia Tool Steel Co.		4,000	4,000
Cicero	Taylor Forge & Pipe Works [7]			
Clearing	Continental Can Co.[8]			
Granite City	St. Louis Gas & Coke Corp.[5]	400,000		
Harvey	Bliss & Laughlin [9]			
70 Joliet	Phoenix Mfg. Co.			16,000
Peoria	Keystone Steel & Wire Co.		205,000	170,000
Sterling	Northwestern Barbed Wire Co.[10]			
Waukegan	Cyclone Fence Co.[11]			

[1] 8,500 tons wire
[2] 15,000 tons miscellaneous products
[3] 780 tons nails
[4] 202,000 tons pipe
[5] Idle. Source: *Iron & Steel Works Directory*, 1935.
[6] 40,700 tons cold drawn bars
[7] 13,200 tons pipe
[8] 100,000 tons tin plate
[9] 80,400 tons cold drawn bars
[10] 180,000 tons plain wire
[11] 66,000 tons wire goods and fencing. Subsidiary of U. S. Steel Corp.

The following table contrasts the capacity of the reported plants to produce the principal products with the total capacity of all plants in Illinois:

	Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Total capacity of all plants:	5,611,000	7,357,800	5,286,650
Total capacity of reported plants:	4,147,200	6,234,800	3,947,050

The reported plants account for approximately 75 per cent of the State's capacity to produce pig iron, 85 per cent of the ingot capacity and 75 per cent of the hot rolled capacity. It should be noted, however, that a large part of the non-reported capacity is possessed by the International Harvester Company which produces steel for its own purposes (R 218). The same thing is no doubt true of the Atchison, Topeka and Santa Fe Railroad Company, the American Locomotive Company, and the Continental Can Company. It should also be noted that the St. Louis Gas and Coke Corporation is listed as idle. When allowance is made for these concerns, it is seen that the coverage of the reported plants is very large.

The industry in Illinois is centered in and around Chicago with a minor concentration in the neighborhood of St. Louis, Missouri. The wage survey is representative of the geographical distribution of the plants. The survey is also representative of the products of the industry produced in Illinois. Wire, nails and fencing are produced in reported plants, as well as pig iron, ingots and hot rolled products.

The wage survey for Illinois includes both large and small plants and companies. The Carnegie-Illinois operates an enormous plant at South Chicago and a large plant at Joliet. The Youngstown Sheet and Tube Company has a large pig iron plant in the Chicago area and the Republic Steel Company, a moderately-sized plant at South Chicago and a very small plant in the western part of the State, at Moline. The American Steel and Wire Company has plants at DeKalb, Joliet and Waukegan. The Inland Steel Company operates a small plant at Chicago Heights. Those are the large companies, all of which have reported wage data for their Illinois plants. A number of small com-
71 panies have reported, the Laclede Steel Company, Wilson Steel and Wire Company, the Calumet Steel Company, and the Granite City Steel Company. The survey for Illinois contains a very representative sampling of the industry by size of company and plant, by product, by location and an exceptionally high coverage of the workers employed in the industry.

Wage data for 10 plants located in Indiana have been received by the Board in response to the notice of these proceedings. The following table gives us the location, name, and the capacity to produce for each of the plants for which wage data have been reported:

Location	Name of Company	Annual Tonnage Capacity: Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Anderson	American Steel & Wire Co.			105,000
East Chicago	Youngstown Sheet & Tube Co.	561,600	960,000	714,000
Elwood	Carnegie-Illinois Steel Corp.[1]			77,800
Gary (2 plants)	Carnegie-Illinois Steel Corp.	3,493,100	5,243,000	3,714,300
Gary	National Tube Co.			345,900
Indianapolis	Chapman Price Steel Co.[2]			
Indianapolis	Continental Steel Corp.			44,600
Indiana Harbor	Inland Steel Co.	1,003,000	2,000,000	1,516,000
Kokomo	Continental Steel Corp.		280,000	210,000

[1] 153,500 tons tin plate
[2] 50,000 tons black and galvanized sheets

No reports were received from companies operating the following 9 plants located in the State. Their location, name and productive capacities are as follows:

Location	Name of Company	Annual Tonnage Capacity: Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Crawfordsville	Mid-States Steel & Wire Co.[1]			
Ft. Wayne	Joslyn Mfg. & Supply Co.			38,400
Gary	Union Drawn Steel Co.[2]			
Hammond	LaSalle Steel Co.[3]			
Indiana Harbor	Standard Forgings Co.[4]			
Kokomo	Kokomo Nail & Brad Co.[5]			
Muncie	Indiana Steel & Wire Co.[6]			
New Castle	Ingersoll Steel & Disc. Co.		13,200	50,000
Terre Haute	Highland Iron & Steel Co.			48,300

[1] 38,000 tons plain wire
[2] 80,400 tons cold drawn products
[3] 100,000 tons cold drawn bars
[4] 70,000 tons railroad axles
[5] 4,200 tons nails and brads
[6] Capacity not given

73 The following table contrasts the capacity of the reported plants to produce the principal products with the total capacity of all plants in Indiana.

	Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Total capacity of all plants:	5,057,700	8,496,200	6,864,300
Total capacity of reported plants:	5,057,700	8,483,000	6,727,600

No more than a glance at the comparison above is needed to show the practically complete coverage of the reported plants in terms of capacity to produce the principal products of the industry. This indicates the large coverage of the iron and steel workers in Indiana by the wage data in the record.

The principal center of the industry is in the Gary neighborhood and there is a moderate development of the industry in the central part of the State around Indianapolis and Kokomo. The reported plants give us a representative view of the geographical distribution of the plants.

With regard to size of company and plant, the reported plants account for all of the large scale operations and companies. At Gary is located an enormous producing center owned by Carnegie-Illinois. The Inland Steel Company has a large plant at Indiana Harbor and the Youngstown Sheet and Tube Company, a large plant at East Chicago. These are the largest companies and plants in Indiana. However, among the reported companies are the smaller Continental Steel Company and the Chapman Price Steel Company. The non-reported companies are all small. A majority produce specialties, such as wire and nails. Only one non-reported plant has capacity to produce steel ingots and these in a small amount.

We have no doubt from the comparison of the reported plants with the non-reported plants in Indiana that the wage data in the record for the State are exceptionally complete in its coverage of workers employed in the industry and that the survey is representative in all essential respects.

Iowa

No information was received from the Keokuk Electro-Metals Company in response to the notices given to it of

the proceedings. This company accounts for the entire iron and steel capacity of the State. It has a capacity to produce 15,000 tons of ferro-silicon.

74 *Kentucky*

Wage data for 2 plants located in Kentucky have been received by the Board in response to the notices of the proceedings. The following table gives us the location, name, and the capacity to produce for the two plants for which wage data have been reported:

Location	Name of Company	Annual Tonnage Capacity: Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Ashland	American Rolling Mill Co.	255,900	553,400	373,000
Newport	Andrews Steel Co.		360,000	90,000

No reports were received from the other 2 plants located in the State. They are the Newport Rolling Mill at Newport which has a capacity to produce 180,000 tons of finished hot rolled products, and the Ewald Iron Company at Louisville which has a capacity to produce 12,000 tons of finished hot rolled products.

The 2 non-reported works account for the smaller portion of the productive capacity of the Kentucky plants. The reported plants produce 100% of the pig iron and steel ingots in the State and approximately 70% of the finished hot rolled products. The wage data in the record are adequate to give a picture of the industry in Kentucky in every respect.

Maine

No information was received from the Bancroft and Martin Rolling Mills in response to the notices given to it of the proceedings. This company accounts for the entire iron and steel capacity of the State. It has a capacity to produce 18,000 tons of finished hot rolled products.

Maryland

Wage data for 3 plants located in Maryland have been received by the Board in response to the notices of these proceedings. The following table gives us the location,

name, and the capacity to produce for each of the plants for which wage data have been reported:

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Location	Name of Company	Annual Tonnage Capacity: Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Baltimore	Eastern Rolling Mill Co.			90,000
Baltimore	Rustless Iron & Steel Corp.		23,000	14,000
Sparrows Point	Bethlehem Steel Corp.	1,663,200	2,467,000	1,458,000

No reports were received from companies operating the other 3 plants located in the State. All three of these plants are located in Cumberland. One of them, The N. & G. Taylor Company, has a capacity to produce 22,000 tons of finished hot rolled products. Another, The Cumberland Steel Company, has a capacity to produce 72,000 tons of shafting and the third, The B. & O. Railroad Company, has a capacity to produce 10,000 tons of finished hot rolled products.

It is clear that the reported plants account for all but a small fraction of the Maryland capacity to produce the principal products of the industry. The entire pig iron and steel ingot capacities for the State are shown for two of the three reported works. Approximately 98% of the finished hot rolled products capacity is accounted for by the reported plants.

The largest plant in Maryland, and one of the largest in the country, the Bethlehem Steel Company at Sparrows Point, has reported its wage data. The other two plants are located in the same area. These plants are both small. The reported plants are concentrated at Baltimore but in view of the smallness of the distance between centers, we believe that the geographic coverage is satisfactory, especially in view of the predominance of the Baltimore area in the Maryland industry. The data for Maryland are adequate and representative judged by the various criteria which we are using to appraise the wage survey.

Massachusetts

Wage data for 8 plants located in Massachusetts have been received by the Board in response to the notices of these proceedings. The following table gives us the loca-

tion, name, and the capacity to produce for each of the plants for which wage data have been reported:

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Location	Name of Company	Annual Tonnage Capacity: Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Holyoke	Geo. W. Prentiss & Co.[1]			
Wareham	Tremont Nail Co.[2]			
Worcester (3 plants)	American Steel & Wire Co.		190,000	177,500
Worcester	Johnson Steel & Wire Co.[3]			
Worcester	Worcester Pressed Steel Co.[4]			
Worcester	G. F. Wright Steel & Wire Co.[5]			

[1] 8,400 tons wire
[2] 3,000 tons nails
[3] 10,000 tons wire
[4] 6,750 tons cold rolled strip
[5] 13,000 tons wire

No reports were received from companies operating the following 12 plants located in the State. Their location, name and productive capacities are as follows:

Location	Name of Company	Annual Tonnage Capacity: Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Boston	Northern Steel Co.			12,500
Boston	Thompson Wire Co.[1]			
Clinton	Wickwire-Spencer Steel Co.[2]			
Everett	Mystic Iron Co.	165,000		
Mansfield	New England Drawn Steel Co.[3]			
Millbury	New England High Carbon Wire Co.[4]			
Palmer	Wickwire-Spencer Steel Co.[5]			
Readville	Compressed Steel Shafting Co.[6]			
Worcester	National Standard Co.[7]			
Worcester	Thompson Wire Co.[8]			
Worcester (2 plants)	Wickwire-Spencer Steel Co.[8]			

[1] 14,000 tons wire and cold rolled strip
[2] 12,700 tons miscellaneous products
[3] 11,400 tons cold drawn bars
[4] 7,800 tons wire
[5] 48,000 tons wire
[6] 5,000 tons cold drawn bars
[7] 9,900 tons wire
[8] 30,000 tons wire

77 The plants in Massachusetts are devoted primarily to the production of specialty products, such as wire and nails. The reported plants are representative of this

type of production. The only pig iron plant in the State has not reported. The production of ingots is accounted for entirely by reported plants and the production of hot rolled products is almost entirely accounted for. The plants in Massachusetts are all small. The large company operating in the State, the American Steel and Wire Company, has reported wage data for its plants. While the wage survey is not as complete for Massachusetts as has been the case in most of the other important producing states, we feel that the data in the record for this State give us an adequate and representative sample judged in terms of numbers of workers employed, plant location, size of company and plant, and nature of product with the exception of pig iron.

Michigan

Wage data for 7 plants located in Michigan have been received by the Board in response to the notices of these proceedings. The following table gives us the location, name, and the capacity to produce for each of the plants for which wage data have been reported:

Location	Name of Company	Annual Tonnage Capacity: Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Dearborn	Detroit Seamless Tubes Co.			25,800
Detroit	Detroit Steel Corp.[1]			
Detroit (3 plants)	Great Lakes Steel Corp.	360,200	920,000	950,000
Monroe	Republic Steel Corp.[2]			200,000
Newberry	Newberry Lumber & Chemical Co.	29,000		

[1] 123,000 tons cold rolled strip

[2] Reported in the *Iron and Steel Works Directory*, 1935, as the Newton Steel Co.

78 No reports were received from companies operating the following 13 plants located in the State. Their location, name and productive capacities are as follows:

Location	Name of Company	Annual Tonnage Capacity: Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Adrian	American Cable Co., Inc.[1]			
Dearborn	Bopp Steel Corp.[2]			
Dearborn	Ford Motor Co.	550,000	1,091,475	356,100
Detroit	Automatic Products Co.[3]			
Detroit	Rotary Electric Steel Co.		100,000	80,000
Detroit	McLouth Steel Corp.			50,000
Ferndale	Steel & Tubes, Inc.[4]			
Jackson	Jackson Fence Co.[5]			
Marquette	The Cleveland-Cliffs Iron Co.[6]	36,000		
Mancelona	Antrim Iron Co.	23,700		
South Lyon	Michigan Seamless Tube Co.			8,000
Sturgis	Formed Tubes, Inc.[1]			
Wells	Delta Chemical & Iron Co.	24,000		

[1] Capacity not given
[2] 16,500 tons cold rolled strip
[3] 15,000 tons cold drawn bars
[4] 13,000 tons tubes. Subsidiary of Republic Steel Corp. Source: *Moody's Industrials*, 1938.
[5] 13,400 tons wire fence
[6] Last operated in 1931. Source: *Iron & Steel Works Directory*, 1935.

The following table contrasts the capacity of the reported plants to produce the principal products with the total capacity of all plants in Michigan:

	Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Total capacity of all plants:	1,022,900	2,111,475	1,669,900
Total capacity of reported plants:	389,200	920,000	1,175,800

79 The discrepancy between the capacity figures for the reported works when compared with the total productive capacity of the industry in Michigan is accounted for to a large extent by the producing capacity of the Ford Motor Company. Assuming that all or a large part of the Ford Motor Company production is for the company's own use in automobile manufacture, (R. 218), the statistics for the State may be considered as substantial in their coverage of the works producing iron and steel for the open market. Exclusive of the capacity of the Ford Company, the reporting plants account for approximately 80% of the capacity to produce pig iron and 90% of the capacity to produce steel ingots, and finished hot rolled

products. The wage data in the record give us a high degree of coverage of the workers employed in the Michigan iron and steel plants. A producer of a specialty product is included among the reported plants. The Michigan industry centers in and around Detroit, but there is some development in the smaller communities. Our wage sample gives us some indication of the wages in the outlying districts as well as a thoroughgoing view of the Detroit vicinity. The largest producer for the open market in the State, The Great Lakes Steel Corporation, has reported for its plants, and the Republic Steel Corporation has reported for its small plant at Monroe. The other reported companies are small. We believe that the wage data in the record for Michigan are adequate judged by the criteria used here.

Minnesota

Wage data for one of the two plants located in Minnesota have been received by the Board in response to the notices of these proceedings. This is the American Steel & Wire Company's Duluth works which has a capacity to produce 300,000 tons of steel ingots and steel for castings and 220,000 tons of finished hot rolled products. No data have been received from the Interlake Iron Corporation at West Duluth. This plant has a capacity to produce 113,400 tons of pig iron.

Missouri

Wage data for two plants located in Missouri have been received by the Board in response to the notices of these proceedings.

Both of the reported plants are owned by the Sheffield Steel Corporation. One, located at Kansas City, has a capacity to produce 232,400 tons of steel ingots and steel for castings and 240,200 tons of finished hot rolled products. The other, located at St. Louis, has a capacity to produce 204,100 tons of steel ingots and steel for castings and 206,600 tons of finished hot rolled products.

No reports were received from companies operating the following 5 plants located in the State. Their location, name and productive capacities are as follows:

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Location	Name of Company	Annual Tonnage Capacity: Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Kansas City	Union Wire Rope Corp.[1]			
St. Louis	Mississippi Valley Iron Co.[2]	125,000		
St. Louis	Missouri Rolling Mill Corp.			70,000
St. Louis	St. Louis Screw & Bolt Co.			15,000
St. Louis	Scullin Steel Co.		58,900	

[1] 7,500 tons wire
[2] Idle. Source: Iron and Steel Works Directory, 1935

The following table contrasts the capacity of the reported plants to produce the principal products with the total capacity of all plants in Missouri:

	Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Total capacity of all plants:	125,000	495,400	531,800
Total capacity of reported plants:		436,500	446,800

The statistics in the record for Missouri give us a good coverage in terms of capacities to produce. Since the only plant having a capacity to produce pig iron is listed as being idle, we may eliminate that product from our consideration in evaluating the coverage afforded by the two reported plants. They account for approximately 90 per cent of the State's capacity to produce steel ingots and 85 per cent of the capacity to produce hot rolled products. The reported plants are representative of the Missouri industry in so far as product and geographic distribution are concerned. The reported plants are moderate in size and the operating company is moderately large. This company, the Sheffield Steel Corporation, is a subsidiary of the American Rolling Mill Company. With the exception of the small company criterion, the data in the record for Missouri are representative of the industry in the State.

New Jersey

Wage data for 5 plants located in New Jersey have been received by the Board in response to the notices of these proceedings. The following table gives us the location,

name, and the capacity to produce for each of the plants for which wage data have been reported:

81

Location	Name of Company	Annual Tonnage Capacity: Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Dover	Ulster Iron Works			16,000
Harrison	Crucible Steel Co. of America		86,700	82,000
Jersey City	Crucible Steel Co. of America [1]			
Kenilworth	Carpenter Steel Co.[2]			
Trenton	American Steel & Wire Co.[3]			

[1] 3,300 tons wire and 5,4000 tons cold rolled strip
[2] Capacity not given.
[3] 28,170 tons wire

No reports were received from companies operating the following 14 plants located in the State. Their location, name and productive capacities are as follows:

Location	Name of Company	Annual Tonnage Capacity: Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Bayonne	International Nickel Co.[1]			
Camden	Camden Forge Co.[2]			
Clifton	Athenia Steel Co.[3]			
Jersey City	Ames & Co.			25,000
Morristown	Drivef Harris Co.		2,970	
Newark	Heller Bros. Co.[1]			
Newark	Igoe Bros.[4]			
Newark	Stewart Hartshorn Co.[5]			
Newark	U. S. Steel & Wire Co.[1]			
New Brunswick	Webb Wire Works [6]			
Rockaway	Rockaway Rolling Mill			15,000
Trenton	Crescent Insulated Wire & Cable Co.[7]			
Trenton	John A. Roeblings Sons Co.		190,000	145,000
Union	Hind Steel Co.[8]			

[1] Capacity not given.
[2] 40,000 tons finished steel
[3] 4,000 tons cold rolled strip
[4] 18,000 tons plain wire
[5] 3,000 tons wire
[6] 420 tons wire
[7] 9,000 tons cold rolled strip
[8] 2,400 tons cold rolled strip

The following table contrasts the capacity of the reported plants to produce the principal products with the total capacity of all plants in New Jersey:

	Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Total capacity of all plants:		279,670	283,000
Total capacity of reported plants:		86,700	98,000

83 The plant with the largest capacity in New Jersey has not been reported, and the coverage of the wage data is not as complete as it has been found to be in most of the other states. A majority of the plants in New Jersey produce specialty products, such as wire and cold rolled strip. The wage sample in the record is representative of these products as well as of the principal products of the industry. New Jersey has no pig iron capacity. Both large and small companies have reported their wage data. Although the wage survey is not as extensive in terms of numbers of workers as in other states, we feel that the samplo for New Jersey is sufficiently large and representative to give us a view of the minimum wage structure of the iron and steel industry in the State.

New York

Wage data for 15 plants located in New York have been received by the Board in response to the notices of these proceedings. The following table gives us the location, name, and the capacity to produce for each of the plants for which wage data have been reported:

		Annual Tonnage Capacity		
Location	Name of Company	Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Buffalo	Hanna Furnace Corp.	674,700		
Buffalo	Republic Steel Corp.	450,000	566,000	351,000
Cohoes	Cohoes Rolling Mill Co.			30,000
Lackawanna	Bethlehem Steel Co.	1,490,400	2,370,000	1,649,000
Lockport	Simonds Saw & Steel Co.		12,000	6,850
N. Tonawanda	Buffalo Bolt Co.			65,000
N. Tonawanda	Tonawanda Iron Corp.	162,000		
Standish	Chateaugay Ore & Iron Co.	100,000		
Syracuse	Crucible Steel Co of America		51,700	30,000
Syracuse	Crucible Steel Co of America		15,000	7,445
Syracuse	Eckels-Nye Steel Co.			10,200
Tonawanda	Buffalo Steel Co.			36,000
Troy	Burden Iron Co.			24,000
84 Troy	Rail Joint Co.			10,000
Troy	Troy Furnace Co.	150,000		

No reports were received from companies operating the following 17 plants located in the State. Their location, name and productive capacities are as follows:

Location	Name of Company	Annual Tonnage Capacity: Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Auburn	Tuttle Rolling Mill [1]			2,400
Brooklyn	Jackson Tube Co.[2]			
Brooklyn	Steel & Tubes, Inc.[3]			
Buffalo	Bliss & Laughlin [4]			
Cortland	Wickwire Bros.		42,000	37,200
Dunkirk	Ludlum Steel Co.		15,000	13,000
Elmira	Elmira Steel Products Co.[2]			
New York	Metal & Thermite Corp.[5]			
Niagara Falls	Electro-Metallurgical Co.[2]			
Niagara Falls	Pittsburgh Metallurgical Co., Inc.	30,000		
Niagara Falls	Titanium Alloy Mfg. Co.	5,000		
Niagara Falls	Vanadium Corp. of America	40,000		
Port Henry	Witherbee Sherman Corp.[6]	288,000		
Rome	Rome Mfg. Co.[7]			
Rome	Rome Strip Steel Co.[8]			
85 Tonawanda	Wickwire-Spencer Steel Co.	324,000	150,000	125,000
Watervliet	Ludlum Steel Co.		23,000	15,600

[1] Last operated in 1931; Source: *Iron & Steel Works Directory*, 1935
[2] Capacity not given.
[3] 15,000 tons electric-weld tube. Subsidiary of Republic Steel Corp.
[4] 53,600 tons cold drawn bars. Source: *Moody's Industrials*, 1938
[5] Works at San Francisco, E. Chicago, and 2 in New Jersey. No capacities given.
[6] Operated by Republic Steel Corp. Source: *Moody's Industrials*, 1938.
[7] 10,000 tons tubing
[8] 9,000 tons cold rolled strip

The following table contrasts the capacity of the reported plants to produce the principal products with the total capacity of all plants in New York:

	Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Total capacity of all plants:	3,714,100	3,244,700	2,412,695
Total capacity of reported plants:	3,027,100	3,014,700	2,219,495

The principal center of production in New York is in and around Buffalo. Seven of the reported works are located in this area. Another center of production is in the north central part of the State in and around Syracuse and Troy. Seven reports have been received from this area. Thus, 14

of the 15 reported plants are located within the two principal producing centers of New York State.

The companies reporting wage data range from the largest to the smallest, including all degrees of size. The same is true with regard to plants. The very large plant of the Bethlehem Steel Company and the large plant of the Republic Steel Corporation have been reported as have such plants as the Buffalo Steel Company and the Burden Iron Company. Among the reported plants there are none in which specialty products are produced exclusively, but the reported plants are representative of these specialty products as well as the principal products of the industry. We have no doubt as to the representative nature of the wage data for New York and, in view of the fact that the reported plants account for over 80 per cent of the pig iron capacity and over 90 per cent of the ingot and hot rolled capacity, we believe that the wage data in the record are inclusive of a very high proportion of the workers in the New York plants.

86 *Ohio*

Wage data for 46 plants located in Ohio have been received by the Board in response to the notices of these proceedings. The following table gives us the location, name and the capacity to produce for each of the plants for which wage data have been reported:

Location	Name of Company	Annual Tonnage Capacity: Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Canton	Carnegie-Illinois Steel Corp.			65,100
Canton (2 plants)	Republic Steel Corp.[1]	210,000	1,053,000	683,000
Canton	Superior Sheet Steel Co.			72,000
Canton, Gambrinus & Wooster	Timken Steel & Tube Co.[2]		340,000	236,833
Cambridge (2 plants)	Carnegie-Illinois Steel Corp.			95,900
Campbell	Youngstown Sheet & Tube Co.	1,958,400	1,320,000	1,204,000
Cleveland (6 plants)	American Steel & Wire Co.	472,700	600,000	523,000
Cleveland (2 plants)	Otis Steel Co.[2]	430,000	872,000	495,000
Cleveland	Republic Steel Corp.	1,040,000	1,400,000	399,000
Columbus	American Rolling Mill Co.	258,600		
Dover	Reeves Steel & Mfg. Co.			50,000
Hamilton	Hamilton Coke & Iron Co.[3]	182,500		
Hubbard	Youngstown Sheet & Tube Co.	313,200		
87 Jackson	Globe Iron Co.	90,000		
Lorain	National Tube Co.	1,215,000	1,500,000	1,135,000
McDonald	Carnegie-Illinois Steel Corp.[4]			893,100
Marion	Pollak Steel Co.			40,000
Martins Ferry	Carnegie-Illinois Steel Corp.			92,000
Martins Ferry	Wheeling Steel Co.	118,300		36,000
Massillon	Republic Steel Corp.	230,000	523,000	378,000
Middletown	American Rolling Mill Co.		660,400	320,400
Mingo Junction	Carnegie-Illinois Steel Corp.	715,700	600,000	65,000
Newark	Buckeye Rolling Mill Co.			25,000
Niles	Republic Steel Corp.			96,000
Portsmouth	Wheeling Steel Co.	210,200	500,000	378,000
Steubenville	Weirton Steel Co.			83,000
Steubenville	Wheeling Steel Co.	459,900	750,000	185,000
Warren	Republic Steel Corp.		656,000	621,000
Yorkville	Wheeling Steel Co.			108,000
Youngstown	Carnegie-Illinois Steel Corp.	1,500,000	1,700,000	283,000
Youngstown	Fitzsimmons Co.[5]			
88 Youngstown	Republic Steel Corp.	980,000	1,523,000	979,000
Youngstown and Lowellville	Sharon Steel Corp.	155,000		75,700
Youngstown	Youngstown Sheet & Tube Co.	464,400	840,000	204,000
Zanesville	American Rolling Mill Co.			43,000

[1] Includes data for the Canton Tinplate Corp. See *Moody's Industrials*, 1938.

[2] The Steel Workers' Organizing Committee reports a union agreement.

[3] Now a division of the American Rolling Mill Co. Source: *Moody's Industrials*, 1938.

[4] Listed in the 1935 *Iron and Steel Works Directory*. No wage data have been reported for this plant in these proceedings.

[5] 32,148 tons cold drawn bars

No reports were received from companies operating the following 29 plants located in the State. Their location, name and productive capacities are as follows:

Location	Name of Company	Annual Tonnage Capacity: Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Ashtabula	Empire Sheet & Tin Plate Co.			46,500
Bedford	Cuyahoga Steel & Wire Co.[1]			
Berea	Cleveland Cold Rolling Mills [2]			
Canton	Barium Stainless Steel Co.		10,000	
Cleveland	Davey Steel Co.			36,000
Cleveland	Steel & Tubes, Inc.[3]			
89 Cuyahoga Falls	Falls Hollow Staybolt Co.			8,000
Dover	Greer Steel Co.[4]			
Elyria	Steel & Tubes, Inc.[5]			8,000
Fostoria	Seneca Wire & Mfg. Co.[6]			
Ironton	Marting Iron & Steel Co.[7]	150,000		
Jackson	Jackson Iron & Steel Co.	45,000		
Leetonia	Pittsburgh Coke & Iron Co.	164,000		
Mansfield	Empire Sheet & Tin Plate Co.		325,000	111,500
Marietta	Robertson Steel & Iron Co.[8]			45,000
Massillon	Union Drawn Steel Co.[9]			
Newton Falls	Newton Steel Co.[10]			140,000
Niles	Empire Sheet & Tin Plate Co.			74,000
Niles	Mahoning Valley Steel Co.			65,000
Philo	Ohio Ferro-Alloys Corp.	17,500		
Shelby	Ohio Seamless Tube Co.[11]			
90 Struthers	Struthers Iron & Steel Co.[8]	151,000		
Toledo	Interlake Iron Corp.	513,000		
Toronto	Follansbee Bros. Co.		110,000	73,900
Warren	Brainard Steel Corp.[12]			
Warren	Steel & Tubes, Inc.[13]			
Warren	Thomas Steel Co.[14]			
Warren	Trumbull Cliffs Furnace Co.	60,000		
Youngstown	Cold Metal Process Co.[15]			

[1] 8,600 tons wire
[2] 500 tons cold rolled strip
[3] 55,000 tons tube and tubing. Subsidiary of Republic Steel Corp. Source: Moody's Industrials, 1938.
[4] 58,800 tons cold rolled sheets
[5] 25,000 tons cold rolled strip. Subsidiary of Republic Steel Corp. Source: *Moody's Industrials*, 1938.
[6] 28,700 tons wire
[7] Dismantled. Source: *Iron & Steel Works Directory*, 1935.
[8] Idle. Source: *Iron & Steel Works Directory*, 1935.
[9] 125,000 tons cold drawn products
[10] Subsidiary of Republic Steel Corp. Source: *Moody's Industrials*, 1938
[11] 48,000 tons seamless tubes
[12] 24,500 tons cold rolled strip
[13] 12,000 tons electric weld tubes. Subsidiary of Republic Steel Corp. Source: *Moody's Industrials*, 1938.
[14] 45,000 tons cold rolled strip
[15] 180,000 tons cold rolled strip

The following table contrasts the capacity of the reported plants to produce the principal products with the total capacity of all plants in Ohio:

	Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Total capacity of all plants:	11,504,400	15,772,800	10,471,933
Total capacity of reported plants:	10,103,900	14,837,400	9,864,033

The inclusive nature of the wage survey for Ohio is apparent from this comparison of capacity figures. 87.8 per cent of pig iron capacity, 94.1 per cent of ingot capacity, and 94.2 per cent of finished hot rolled products capacity is accounted for by the reported plants. It should be noted that we have not been able to assign to any specific plant or plants the capacity to produce 490,400 tons of ingots. Our analysis of the capacity figures in the 1935 Directory did not show which plant or plants had such capacity but in view of the large coverage of ingot capacity by the reported plants we do not believe that this relatively small discrepancy is a material matter.

All of the large companies operating in Ohio have
91 reported their wage data, and the large integrated plants are covered completely by the wage data in the record. Small companies and small plants are also covered by the Statistics. A number of small companies operating small specialty plants and small plants with capacity only for finished hot rolled products have not reported wage data. Reports were not received for the moderately sized plant of the Empire Sheet and Tin Plate Company nor for the small plant of Follansbee Bros. Co. both of which have ingot capacity. Two pig iron producers with moderate capacity, the Interlake Iron Corporation and the Trumbull Cliffs Furnace Co., have not reported.

Despite these non-reporting companies, however, the wage survey for Ohio is extraordinarily complete in its coverage of the companies and plants. Furthermore the factors of size of company and plant, products, and geographic locations are thoroughly representative of the Ohio iron and steel industry.

Oklahoma

Wage data for one plant located in Oklahoma have been received by the Board in response to the notices of these proceedings. This company accounts for the entire iron and steel capacity of the State. It is the Sheffield Steel Corporation, located at Sand Springs, and it has a capacity to produce 50,000 tons of steel ingots and steel for castings and 35,000 tons of finished hot rolled products.

Oregon

No information was received from the Steel Tank and Pipe Company of Oregon in response to the notices given to it of these proceedings. This company accounts for the entire iron and steel capacity of the State. It has a capacity to produce 1,500 tons of electric weld pipe.

Pennsylvania

Wage data for 79 plants located in Pennsylvania have been received by the Board in response to the notices of these proceedings. The following table gives the location, name, and the capacity to produce for each of the plants for which wage data have been reported:

Location	Name of Company	Annual Tonnage Capacity		
		Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Allenport	Pittsburgh Steel Co.[1]			
Allentown	American Steel & Wire Co			105,000
Aliquippa	Jones & Laughlin Steel Corp.	1,566,000	1,449,000	1,270,000
Apollo	Apollo Steel Co.			120,000
Berwick	American Car & Foundry Co.			48,000
Bessemer	Carnegie-Illinois Steel Corp.	2,200,000	1,445,000	784,000
Bethlehem	Bethlehem Steel Co.	1,231,200	1,813,600	1,367,600
Birdsboro	Brooke Iron Co.	132,000		
Brackenridge and Leechburg	Allegheny Steel Co.[2]		482,000	514,200
Braeburn	Braeburn Alloy Steel Corp.		5,040	3,000
Burnham	Logan Iron & Steel Co.			45,000
Butler	American Rolling Mill Co.		553,400	370,000

[1] 240,000 tons seamless tubes.

[2] Includes data for the West Leechburg Steel Co. Reported by the Steel Workers' Organizing Committee.

Chester	South Chester Tube Co.[3]			
Clairton (2 plants)	Carnegie-Illinois Steel Corp.	544,000	720,000	525,000
Coatsville	Bethlehem Steel Co.			30,000
"	Lukens Steel Co.		840,000	441,000
Conshohocken (3 plants)	Alan Wood Steel Co.	406,080	660,000	238,000
Danville	Bethlehem Steel Co. (see Steelton)			
Donora (3 plants)	American Steel & Wire Co.	380,000	627,000	320,000
Duquesne	Carnegie-Illinois Steel Corp.	1,371,000	1,510,000	1,021,200[3]
Ellwood City	National Tube Co.			128,600
Erie	Erie Forge Co.		48,000	
"	Erie Forge & Steel Co.		75,000	
Etna	Carnegie-Illinois Steel Corp.	180,300		
Farrell	American Steel & Wire Co.			159,000
"	Carnegie-Illinois Steel Corp.	448,000	800,000	326,300

[3] 62,000 tons pipe.

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Franklin	Franklin Steel Works			45,000
Glassport	Pittsburgh Steel Co.			35,000
Harrisburg	Central Iron & Steel Co.		300,180	214,300
"	Harrisburg Steel Corp.		77,500	75,000
Irvin	Carnegie-Illinois Steel Corp.[4]			
Johnstown	Bethlehem Steel Co.	1,332,000	1,670,000	1,143,000
"	Carnegie-Illinois Steel Corp.[5]		18,500	
Latrobe	Latrobe Electric Steel Co.		12,000	5,500
Lebanon	Bethlehem Steel Co.			155,000
"	Wrought Iron Co.			75,000
McKeesport	Carnegie-Illinois Steel Corp.			104,000
"	Firth-Sterling Steel Co.		14,500	9,100
"	National Tube Co. (2 plants)	964,000	900,000	674,800
McKees Rocks	Carnegie-Illinois Steel Corp.[6]			56,900
Milton	Milton Mfg. Co.			30,000
Monaca	Pittsburgh Tube Co.[7]			
Monessen	Carnegie-Illinois Steel Corp.[8]			100,000
"	Pittsburgh Steel Co.	480,000	720,000	575,000
Munhall	Carnegie-Illinois Steel Corp.		2,701,500	2,093,900
New Castle	Carnegie-Illinois Steel Corp.	603,500	550,000	235,200
Philadelphia	Henry Disston & Sons		22,700	34,500

[4] Wage data have been reported for this plant in these proceedings. No such plant is listed in the 1935 Iron & Steel Works Directory.

[5] Reported in the 1935 Iron & Steel Works Directory as the Lorain Steel Co.

[6] Listed in the 1935 Iron & Steel Works Directory. No wage data have been reported for this plant in these proceedings.

[7] 73,200 tons pipe.

94

Philadelphia	Ellwood Ivin's Steel Tube Works[8]			
"	Midvale Co.		273,000	65,400
"	Carnegie-Illinois Steel Corp.[4]			
Phoenixville	Phoenix Iron Co.		208,000	173,600
Pine Forge	Pine Iron Works Co.			12,000
Pittsburgh	Carnegie-Illinois Steel Corp.[6]	113,900		
" (5 plants)	Crucible Steel Co. of America[9]	460,000	809,950	691,900
Pittsburgh	Heppenstall Co.		46,600	
"	Jones & Laughlin Steel Corp.	1,434,000	2,222,200	1,567,600
"	Republic Steel Corp.	240,000		100,000
Rankin	American Steel & Wire Co.			115,000
"	Carnegie-Illinois Steel Corp.[6]	1,586,500		
Reading	Carpenter Steel Co.		39,200	28,000
Scottdale	Carnegie-Illinois Steel Corp.			65,900
Sharon	Sharon Steel Corp.		450,000	230,200
Sheridan	Lavino & Co.	36,000		
Steelton	Bethlehem Steel Co.	658,800	660,000	501,500
Vandergrift	Carnegie-Illinois Steel Corp.		340,000	178,000
Washington	Jessop Steel Co.		16,000	8,500
"	Molybdenum Corp. of America[10]			

[4] Wage data have been reported for this plant in these proceedings. No such plant is listed in the 1935 Iron & Steel Works Directory.

[6] Listed in the 1935 Iron & Steel Works Directory. No wage data have been reported for this plant in these proceedings.

[8] 1,350 tons cold drawn seamless tubes.

[9] Includes data for Pittsburgh Crucible Steel Co., and National Drawn Steel Co., Inc.

[10] Capacity not given.

[11] 165,000 tons axles. No wage data have been reported for this plant in these proceedings.

95

West Homestead	Carnegie-Illinois Steel Corp.[11]			
Williamsport	Bethlehem Steel Co.[10]			
"	Sweet's Steel Co.			60,000

No reports were received from companies operating the following 60 plants located in the State. Their location, name and productive capacities are as follows:

Location	Name of Company	Annual Tonnage Capacity: Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Aliquippa	Kidd Drawn Steel Co.[1]			
"	Vulcan Crucible Steel Co.		9,634	2,500
Ambridge	A. M. Byers Co.			122,000
"	Central Tube Co.[2]			
"	Spang, Chalfant & Co.[3]			
"	Wycoff Drawn Steel Co.[4]			
Beaver Falls	Babcock & Wilcox Tube Co.			71,400
"	Moltrup Steel Products Co.[5]			
"	Union Drawn Steel Co.[6]			
Bridgeville	Universal-Cyclops Steel Corp.		52,900	39,468
"	Vanadium Corp. of America	960		
Burnham	Standard Steel Works		142,700	57,000
Butler	Fretz-Moon Tube Co.[7]			
Canonsburg	Canonsburg Steel & Iron Works			35,000

[1] 5,000 tons cold drawn steel
[2] 356,100 tons pipe
[3] 300,000 tons seamless tubes
[4] 95,000 tons cold drawn bars
[5] 72,000 tons cold drawn bars
[6] 53,600 tons cold drawn products
[7] 70,000 tons pipe

96

Canonsburg	Standard Tin Plate Co.			110,000
Carnegie	Superior Steel Corp.			107,000
Catasauqua	Phoenix Mfg. Co.			8,500
Chester	Delaware River Steel Co.[8]	120,000		
Colona	Colonial Steel Co.		52,600	20,000
Columbia	Jamison Steel & Iron Co.			15,000
Corry	McInnes Steel Co.[9]			
Creighton	Penn Iron & Steel Co.			12,000
Danville	American Swede Iron Co.[10]			
"	Reading Iron Co.			35,000
DuBois	Adrian Furnace Co.[8]	85,000		
Ellwood City	Ellwood Steel Corp.[11]			
Erie	Griffin Mfg. Co.[12]			
"	Interlake Iron Corp.	167,400		
Etna	Spang, Chalfant & Co.[13]			
Glassport	Copperweld Steel Co.			15,000
Irvin	National Forge & Ordnance Co.		27,000	
Latrobe	American Locomotive Co.		100,000	60,000
"	Anchor Drawn Steel Co.[14]			
"	Vanadium-Alloys Steel Co.		5,000	3,600
McKeesport	McKeesport Tin Plate Co.			180,000
McKees Rocks	Lockhart Iron & Steel Co.			49,100

[8] Idle. Source: Iron & Steel Works Directory, 1935.
[9] 475 tons bars and forgings
[10] 10,000 tons muck bars
[11] 12,000 tons wire and nails
[12] 25,500 tons cold rolled strip
[13] 225,000 tons pipe
[14] 560 tons cold drawn bars

97

Monaca	Pittsburgh Tool Steel Wire Co.[15]			
Monessen	American Chain & Cable Co.			90,000
Moore	Alloy Metal Wire Co.[16]			
New Brighton	Townsend Co.[17]			
New Castle	Blair Strip Steel Co.[18]			
"	Elliott Bros. Steel Co.[19]			
Oakmont	Edgewater Steel Co.		75,000	51,750
Pencoyd	American Bridge Co.[20]		240,000	222,000
Philadelphia	Nicetown Plate Washer Co.			12,000
Pittsburgh	Mesta Machine Co.		87,500	
Pittsburgh	Pittsburgh Coke & Iron Co.	243,000		
"	Union Electric Steel Corp.[21]			
Pottstown	Reading Iron Co.			12,000
Reading	Reading Iron Co.	130,000		105,000
Riddlesburg	Colonial Iron Co.[8]	72,000		
Sharon	Sharon Tube Co.[22]			
"	Wilkes Rolling Mill[8]			10,000
Sharpsville	Pittsburgh Coke & Iron Co.[8]	150,000		
"	Shenango Furnace Co.	410,000		
"	Shenango-Penn Mold Co.[23]			

[8] Idle. Source: Iron & Steel Works Directory, 1935
[15] 2,000 tons wire
[16] 4,800 tons wire
[17] Wire. No capacity given.
[18] 14,400 tons cold rolled strip
[19] 620 tons cold rolled strip
[20] Subsidiary of U. S. Steel Corp.
[21] Capacity not given.
[22] 5,400 tons pipe
[23] 200,000 tons ingot moulds and stools

98

Spring City	Keystone Drawn Steel Co.[24]			
Titusville	Columbia Tool Steel Co.			4,000
Washington	Washington Tin Plate Co.			22,600
Wheatland	Wheatland Tube Co.[25]			

[24] 8,000 tons cold drawn bars
[25] 138,000 tons pipe

The following table contrasts the capacity of the reported plants to produce the principal products with the total capacity of all plants in Pennsylvania:

	Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Total capacity of all plants	17,924,040	23,421,004	18,737,618
Total capacity of reported plants:	16,367,280	23,079,270	17,265,700

This comparison of capacity figures brings out the inclusiveness of the wage survey for Pennsylvania. 91.3 per cent of pig iron capacity, 98.5 per cent of ingot capacity and 92.1 per cent of finished hot rolled capacity is accounted for by the reported plants. In making an analysis of the capacity figures from the 1935 Directory we have come out

with a capacity of 178,400 tons of pig iron and 450,000 tons of ingots assigned to the plants but in excess of the totals given in the Directory. A rechecking of our analysis has not revealed the source of this discrepancy but since it does not amount to more than 1 per cent of the Pennsylvania pig iron capacity and 2 per cent of the ingot capacity we do not believe that the discrepancy is material.

Reports have been received from all of the large and medium-sized companies operating in Pennsylvania. The integrated plants have been completely covered. The survey is thoroughly representative of small companies and small plants. A number of small companies with capacity for only specialty products or finished hot rolled products have reported their wage data.

As we have seen above 60 plants have not been reported on. Over 20 of these plants are limited to the production of specialty products. For the most part they are small with the exception of the Central Tube Company and Spang Chalfant and Company which have moderately large capacity for the production of pipe and seamless tubes. Several of the non-reported plants have small capacity for finished hot rolled products only, and 9 of these plants have small ingot capacity. Three moderately-sized pig iron plants have not reported, the Interlake Iron Corp., the Pittsburgh Coke and Iron Co., and the Shenango Furnace Co. The largest non-reported plant is the Pencoyd plant of the American Bridge Co., a subsidiary of the U. S. Steel Corp. Since the U. S. Steel Corp. has reported for its operations coming within the terms of the definition (R 282) we may assume that the steel operations at the Pencoyd plant are not designed for the open market.

99 Geographically the wage survey for Pennsylvania is entirely representative. The principal producing centers are thoroughly covered and the reports are representative of the smaller centers as well.

We have no doubt that the data for Pennsylvania is adequate and representative to an exceptionally high degree.

Rhode Island

No information was received from the Newman-Crosby Steel Corporation and the Washburn Wire Company in response to the notices given of these proceedings. These

companies account for the entire iron and steel capacity of the State. One, the Newman-Crosby Steel Corporation, is located at Pawtucket and has an annual capacity of 13,000 tons of cold rolled strip. The other, the Washburn Wire Company, is located at Phillipsdale and has an annual capacity of 51,000 tons of steel ingots and steel for castings and 50,000 tons of finished hot rolled products.

Tennessee

No information was received from any of the six plants operating within the iron and steel industry in response to the notices given of these proceedings. The following table gives us the location, name, and the capacity to produce for each of these plants.

		Annual Tonnage Capacity		
Location	Name of Company	Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Chattanooga	Roane Iron & Coal Co.[1]	180,000		
"	Southern Ferro-Alloys Co.[2]	72,000		
Cumberland Furnace	Warner Iron Co.[1]	15,000		
Knoxville	Knoxville Iron Co.			80,000
Lyles	Tennessee Products Co.[1]	21,600		
Rockdale	Tennessee Products Co.	21,900		

[1] Idle. Source: Iron and Steel Works Directory, 1935

[2] This company has reported that its operations have always been considered as outside the purview of the industry.

100 Reference to the above table shows that the capacity of the active Tennessee plants is small. Only 2 of 5 plants which produce pig iron are reported to be operating at present, and of these, the Southern Ferro-Alloys Company may be eliminated from consideration in view of its report to the Board. There is no capacity in Tennessee for the production of steel ingots and steel for castings. The only company which manufactures finished hot rolled products is a member of the Rail Steel Bar Association which has reported wage data for this company in a composite form which makes it impossible to use the data for a specific plant.

Texas

No information was received from the Texas Steel Company, located at Fort Worth, in response to the notices given to it of these proceedings. This company accounts

for the entire iron and steel capacity of the State. It has a capacity to produce 6,000 tons of steel ingots and steel for castings and 18,000 tons of finished hot rolled products. The company is a member of the Rail Steel Bar Association which has reported composite wage data for this and two other Southern establishments.

Utah

Wage data for one plant operating within the iron and steel industry have been received by the Board in response to the notices of these proceedings. This company accounts for the entire iron and steel capacity of the State. It is the Columbia Steel Company, located at Ironton, and it has a capacity to produce 172,000 tons of pig iron.

Virginia

Wage data for three plants located in Virginia have been received by the Board in response to the notices of these proceedings. The production capacity of the three plants is as follows:

Lavino & Co., Reusens:
36,000 tons of pig iron and ferro alloys

Old Dominion Iron & Steel Works, Richmond:
2,500 tons of steel ingots and steel for castings
5,000 tons of finished hot rolled products

The Tredegar Co., Richmond:
44,000 tons of finished hot rolled products

There are 5 non-reported plants located in Virginia. All of them are shown by the 1935 Directory as idle and accordingly, the reported plants account for the entire present iron and steel capacity of the State. The location, name, and productive capacities of the non-reported plants
101 are as follows:

Allegheny Ore & Iron Co., Buena Vista:
55,000 tons of pig iron and ferro alloys
Pulaski Iron Co., Pulaski:
90,000 tons of pig iron and ferro alloys
Virginia Iron, Coal & Coke Co., 3 plants at Roanoke:
200,000 tons of pig iron and ferro alloys

Washington

Wage data for one plant located in Washington have been received by the Board in response to the notices of these proceedings. This plant, operated by the Bethlehem Steel Company at Seattle, has a capacity to produce 140,000 tons of steel ingots and steel for castings and 119,000 tons of finished hot rolled products.

There are two non-reported plants located in Washington. One, the Northwest Steel Rolling Mills at Seattle, has a capacity to produce 15,000 tons of steel ingots and steel for castings and 12,000 tons of finished hot rolled products. The other, The Rothert Steel Corporation, also located at Seattle, is shown by the 1935 Directory as idle. It has a capacity to produce 1,800 tons of electric steel ingots.

In view of the relatively large size of the Bethlehem plant and the fact that one of the non-reported plants is no longer in operation, it is evident that the wage data for Washington give us almost the entire employment in the Washington industry.

West Virginia

Wage data for 8 plants located in West Virginia have been received by the Board in response to the notices of these proceedings. The following table gives us the location, name, and the capacity to produce for each of the plants for which wage data have been reported:

Location	Name of Company	Annual Tonnage Capacity: Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Beech Bottom	Wheeling Steel Corp.			72,000
Benwood	Wheeling Steel Corp.	170,800	250,000	140,000
Clarksburg	Weirton Steel Co.			59,000
Huntington	W. Va. Rail Co.			125,000
Morgantown	Carnegie-Illinois Steel Corp.			37,000
Parkersburg	Parkersburg Iron & Steel Co.			32,100
Weirton	Weirton Steel Co.	631,800	1,312,000	811,550
Wheeling	Wheeling Steel Corp.			56,000

No report was received from the Follansbee Bros. Company which has a plant at Follansbee with a capacity to produce 90,000 tons of steel ingots and steel for castings and 73,900 tons of finished hot rolled products, nor from the

International Nickel Company which has a plant at Huntington for which no capacity is given.

The following table contrasts the capacity to produce of the reported plants with the total capacity of all plants in West Virginia:

	Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Total capacity of all plants:	802,600	1,652,000	1,405,550
Total capacity of reported plants:	802,600	1,562,000	1,331,650

The statistics in the record for West Virginia give us an extraordinarily broad coverage in terms of capacity to produce, and we have no doubt as to the adequacy of the wage data judged by numbers of workers covered or by the other criteria which have been applied above.

103 *Wisconsin*

No information was received from the 3 iron and steel plants located in Wisconsin in response to the notices given of these proceedings. These companies account for the entire iron and steel capacity of the State. Their respective capacities are as follows:

Simmons Co., Kenosha:
40,000 tons of finished hot rolled products
Globe Steel Tubes, Milwaukee:
54,000 tons of finished hot rolled products
Wrought Washer Mfg. Co., Milwaukee:
5,000 tons of finished hot rolled products.

It is very likely that the steel produced by the Simmons Company and by the Wrought Washer Manufacturing Company is used by these companies in later processes of fabrication.

The United States

What we have just surveyed is practically the productive capacity of the iron and steel industry. We have seen in each of the iron and steel producing states to what extent the plants for which wage data are reported in the record account for the capacity to produce, and we have compared reported and non-reported plants in terms of location, size of plant and company, and nature of product.

With these factors as criteria, we have appraised the inclusiveness and the representative nature of the wage data in the record. For the sake of convenient reference the number of plants reported and non-reported are given below for each State, together with the comparative capacity of the reported and non-reported plants to produce the principal products of the industry. This table also gives the total number of reported and non-reported plants in the United States and a summary of the comparative productive capacity of these plants.

State	Iron and Steel Plants in the State: Reported	Non-Reported	Total	CAPACITIES TO PRODUCE THE PRINCIPAL PRODUCTS OF THE INDUSTRY: Pig Iron and Ferro Alloys: Reported	Non-Reported	Total	Steel Ingots & Steel for Castings: Reported	Non-Reported	Total	Finished Hot Rolled Products: Reported	Non-Reported	Total
UNITED STATES	234	227	461	45,175,080	7,361,620	52,715,100 1/	66,079,070	5,311,619	71,431,089 2/	48,194,428	6,031,018	54,225,446
Alabama	14	4	18	3,153,000	161,360	3,314,360	2,212,500	0	2,212,500	1,688,400	60,000	1,748,400
California	5	4	9	0	0	0	603,500	76,500	680,000	459,900	58,200	518,100
Colorado	0	1	1	0	563,000	563,000	0	888,000	888,000	0	663,500	663,500
Connecticut	5	5	10	0	0	0	144,800	0	144,800	92,500	0	92,500
Delaware	1	0	1	0	0	0	378,000	0	378,000	252,000	0	252,000
Georgia	0	1	1	0	0	0	0	137,040	137,040	0	148,500	148,500
Illinois	17	23	40	4,147,200	1,463,800	5,611,000	6,234,800	1,123,000	7,357,800	3,947,050	1,339,600	5,286,650
Indiana	10	9	19	5,057,700	0	5,057,700	8,483,000	13,200	8,496,200	6,727,600	136,700	6,864,300
Iowa	0	1	1	0	15,000	15,000	0	0	0	0	0	0
Kentucky	2	2	4	255,900	0	255,900	913,400	0	913,400	463,000	192,000	655,000
Maine	0	1	1	0	0	0	0	0	0	0	18,000	18,000
Maryland	3	3	6	1,663,200	0	1,663,200	2,490,000	0	2,490,000	1,562,000	32,000	1,594,000
Massachusetts	8	12	20	0	165,000	165,000	190,000	0	190,000	177,500	12,500	190,000
Michigan	7	13	20	389,200	633,700	1,022,900	920,000	1,191,475	2,111,475	1,175,800	494,100	1,669,900

1/ 178,400 tons short.
2/ 40,400 tons short.

(continued)

State	Iron and Steel Plants in the State			CAPACITIES TO PRODUCE THE PRINCIPAL PRODUCTS OF THE INDUSTRY								
				Pig Iron and Ferro Alloys			Steel Ingots & Steel for Castings			Finished Hot Rolled Products		
	Reported	Non-Reported	Total	Reported	Non-Reported	Total	Reported	Non-Reported	Total	Reported	Non-Reported	Total
Minnesota	1	1	2	0	113,400	113,400	300,000	0	300,000	220,000	0	220,000
Missouri	2	5	7	0	125,000	125,000	436,500	58,900	495,400	446,800	85,000	531,800
New Jersey	5	14	19	0	0	0	86,700	192,970	279,670	98,000	185,000	283,000
New York	15	17	32	3,027,100	687,000	3,714,100	3,014,700	230,000	3,244,700	2,219,495	193,200	2,412,695
Ohio	46	29	75	10,103,900	1,400,500	11,504,400	14,837,400	445,600	15,772,800 3/	9,864,033	607,900	10,471,933
Oklahoma	1	0	1	0	0	0	50,000	0	50,000	35,000	0	35,000
Oregon 5/	0	1	1	0	0	0	0	0	0	0	0	0
Pennsylvania	79	60	139	16,367,280	1,378,360	17,924,040 1/	23,079,270	791,734	23,421,004 4/	17,265,700	1,471,918	18,737,618
Rhode Island	0	2	2	0	0	0	0	51,000	51,000	0	50,000	50,000
Tennessee	0	6	6	0	310,500	310,500	0	0	0	0	80,000	80,000
Texas	0	1	1	0	0	0	0	6,000	6,000	0	18,000	18,000
Utah	1	0	1	172,000	0	172,000	0	0	0	0	0	0
Virginia	3	5	8	36,000	345,000	381,000	2,500	0	2,500	49,000	0	49,000
Washington	1	2	3	0	0	0	140,000	16,800	156,800	119,000	12,000	131,000
West Virginia	8	2	10	802,600	0	802,600	1,562,000	90,000	1,652,000	1,331,650	73,900	1,405,550
Wisconsin	0	3	3	0	0	0	0	0	0	0	99,000	99,000

1/ 178,400 tons short.
3/ 490,400 tons short
4/ 450,000 tons additional.
5/ 1,500 tons electric weld pipe.

106 The adequacy of the coverage of the wage data reported in the record has been appraised above for each state at the time of the discussion of the productive capacity of the state. In some states it has been found that the wage data reported give a more thorough coverage and is more representative than is the case in other states. Our sample is not 100 per cent complete but as we said above, it is not essential that this be the case if on the whole the data in the record give an adequate and representative view of the minimum wage structure of the industry. We have no doubt as to the adequacy of the wage data presented above in section IV for this purpose.

For the nation as a whole, 234 of the 461 plants considered to be within the purview of the industry as defined here have reported wage data for the record. These plants account for approximately 85 per cent of the nation's capacity to produce pig iron, 90 per cent of the steel ingot capacity, and 90 per cent of the capacity to produce hot rolled products. In addition to this, the reported plants account for a large portion of the capacity to produce the specialty products which we have noted in the above analysis separately. We have no doubt as to the sufficiency of the wage data in the record to give us an adequate view of the number of workers employed in the industry, the number being paid the various base rates, and the various base rates in the industry.

The geographical distribution of the reported plants is entirely in line with the distribution of the plants in the various producing states. Plants in every section of the country have reported. Only in the least important producing states, as will be seen by reference to the summary above, have no reports been received. For Colorado we have evidence of the base rate from the survey of the Bureau of Labor Statistics.

The matter of the representative nature of the data from the standpoint of size of the plant and the nature of product as judged by the capacity to produce of the reported plants has been discussed at the time each of the states was being considered. While it will be found that the wage sample varies from state to state in the degree to which it is representative of large, medium and small-

sized plants and also varies with respect to the various types of products, the wage sample as a whole is entirely representative of these factors.

In the above survey we have taken each plant as an entity. The matter of plant ownership should also be given attention and in the following table the representative nature of the wage sample is appraised in the light of the size of companies which have reported data and those from which no reports have been received. In view of the fact that we discuss the question of the size of company more at length in Section VIII below we have confined the present medium of comparison to ingot capacity. We have grouped the companies in accordance with their capacity to produce steel ingots and steel for castings in large, medium, and small-sized companies. Large-sized companies are regarded as those with a total productive capacity of 1,000,000 tons or over; medium sized companies as those with a total productive capacity of less than 1,000,000 tons but not less than 300,000 tons; and small-sized companies as those with a total productive capacity of less than 300,000 tons.

The *Iron and Steel Works Directory* for 1935 has been used as the source for the data in this table.

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Size of Company	Annual Tonnage Capacity	
	Reported Companies	Non-Reported Companies
Large:		
American Rolling Mill Co.[1]	2,244,100	
Bethlehem Steel Co.[2]	9,360,000	
Ford Motor Co.		1,091,475
Inland Steel Co.	2,000,000	
Jones & Laughlin Steel Corp.	3,671,200	
National Steel Corp.[3]	2,232,000	
Republic Steel Corp.[4]	6,529,500	
U. S. Steel Corp.[5]	27,101,900	240,000
Wheeling Steel Corp.	1,500,000	
The Youngstown Sheet & Tube Co.	3,120,000	
Totals	57,758,700	1,331,475
Medium:		
Allegheny Steel Co.[6]		482,000
The Andrews Steel Co.	360,000	
Central Iron & Steel Co.	300,180	
The Colorado Fuel & Iron Co.[7]		888,000
Crucible Steel Co. of America[8]	963,350	

Size of Company	Annual Tonnage Capacity: Reported Companies	Annual Tonnage Capacity: Non-Reported Companies
Empire Sheet & Tin Plate Co.		325,000
Granite City Steel Co.	400,000	

[1] Includes Sheffield Steel Corp. Source: *Moody's Industrials*, 1938.
[2] Includes Pacific Coast Steel Corp.
[3] Includes Great Lakes Steel Corp., and Weirton Steel Co.
[4] Includes Corrigan, McKinney Steel Co., and Gulf States Steel Co.
[5] Includes the American Bridge Co., American Sheet & Tin Plate Co., American Steel & Wire Co., Carnegie Steel Co., Columbia Steel Co., Illinois Steel Co., The Lorain Steel Co., The National Tube Co., and the Tennessee Coal, Iron & Railroad Co. The non-reported plant shown is that of The American Bridge Co., at Pencoyd, Pa.
[6] Base rate reported by the Steel Workers' Organizing Committee.
[7] Base rate estimated from Bureau of Labor Statistics survey.
[8] Includes the Halcomb Steel Co., and the Pittsburgh Crucible Steel Co.

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Medium:		
International Harvester Co.		807,000
Lukens Steel Co.	840,000	
The Otis Steel Co.[6]		872,000
Pittsburgh Steel Co.	720,000	
Sharon Steel Corp.	450,000	
The Timken Steel & Tube Co.[6]		340,000
Alan Wood Steel Co.	660,000	
Worth Steel Co.	378,000	
Totals	5,071,530	3,714,000
Small:		
American Locomotive Co.		205,000
Atlantic Steel Co.		137,040
Barium Steel Corp.		10,000
Braeburn Alloy Steel Corp.	5,040	
The Carpenter Steel Co.	39,200	
Colonial Steel Co.		52,000
Columbia Tool Steel Co.		4,000
Continental Steel Corp.	280,000	
Henry Disston & Sons, Inc.	22,700	
Driver-Harris Co.		2,970
Edgewater Steel Co.		75,000
Erie Forge Co.	48,000	
Erie Forge & Steel Co.	75,000	
Firth-Sterling Steel Co.	14,500	
Follansbee Bros. Co.		200,000
Harrisburg Steel Corp.	77,500	
Heppenstall Co.	46,600	
Ingersoll Steel & Disc Co.		13,200

[6] Base rate reported by the Steel Workers' Organizing Committee.

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Size of Company	Annual Tonnage Capacity: Reported Companies	Annual Tonnage Capacity: Non-Reported Companies
Small:		
Jessop Steel Co.[8]		16,000
Judson Steel Corp.		76,500
Keystone Steel & Wire Co.		205,000
Kilby Car & Foundry Co.	10,000	
Laclede Steel Co.	235,400	
Latrobe Electric Steel Co.	12,000	
Ludlum Steel Co.		38,000
Mesta Machine Co.		87,500
The Midvale Co.	273,000	
National Forge & Ordnance Co.		27,000
Northwest Steel Rolling Mills, Inc.		15,000
Old Dominion Iron & Steel Works, Inc.	2,500	
The Phoenix Iron Co.	208,000	
John A. Roebling's Sons Co.		190,000
Rotary Electrical Steel Co.[8]		100,000
Rothert Steel Corp.[9]		1,800
Rustless Iron Corp. of America	23,000	
Scullin Steel Co.		58,900
Simonds Saw & Steel Co.	12,000	
Standard Steel Works Co.		142,700
The Stanley Works	144,800	
Texas Steel Co.[10]		6,000
Trojan Electric Steel Co.[9]		2,000
Tulsa Steel Corp.	50,000	
Universal Steel Co.		52,900
Vanadium-Alloy Steel Co.		5,000

[8] Base rate reported by the Steel Workers' Organizing Committee.
[9] Not in operation.
[10] This company is a member of the Rail Steel Bar Assn., which has reported composite data for three member firms located in the South.

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Small:		
Vulcan Crucible Steel Co.		9,634
Washburn Wire Co.		51,000
Wickwire Bros., Inc.		42,000
Wickwire-Spencer Steel Co.		150,000
Totals	1,579,240	1,976,144
Grand Totals	64,409,470	7,021,619

From the comparison of companies that have reported wage data for their plants with those that have not, we find that all of the large companies producing steel for the open market have reported. The exception is the Ford Motor Company which, as we have observed before, produces steel for purposes of later fabrication in its own plant. Our wage sample is, consequently, complete in its coverage of the largest companies in the industry.

We have reports in the record from 9 of the 15 companies classified above as medium-sized. For 3 others the base rate has been reported by the Steel Workers' Organizing Committee as the rate established by collective bargaining. For one other medium-sized company we have estimated the base rate from the Bureau of Labor Statistics survey. As a result our wage data in the record for the medium-sized companies are more representative than is shown above. The Allegheny Steel Company, The Colorado Fuel and Iron Company, The Otis Steel Company, and The Timken Steel and Tube Company should be included with the companies for which there are wage data in the record. This increases the capacity of the reported companies to 7,653,530 tons. Actually, we have reports on all but two of the medium-sized companies. The largest of these, the International Harvester Company, produces steel for its own use in later fabrication. It would seem that the coverage of our wage sample is very nearly complete in its inclusion of the medium-sized steel-producing companies.

Despite the efforts made in the course of these proceedings to secure wage data from as many companies in the industry as possible, we find that our coverage of small companies does not include more than one-half of the small companies which have capacity to produce steel ingots. Two companies listed above in the non-reporting column should be included with the companies for which there are wage data in the record. The Steel Workers' Organizing Committee has reported the base rates for these companies.

We have at hand in the record reports on the base rates of 21 of the 48 companies listed above as small producers of steel ingots. While not approaching the coverage of the data in the record for the large and medium-sized plants we believe that a coverage of approximately 45 per cent of such plants gives us an adequate sample, and we conclude that our wage sample is representative of the industry in terms of size of company.

The following table has been constructed from the statistics reported above in section IV. This table gives the various base rates being paid in the industry by the companies which have furnished their wage data for the record, the number of plants which pay each base rate, the total number of workers employed in these plants and the total number of common laborers receiving each base rate:

Base Rates for Common Labor Currently Being Paid in Industry	No. of Iron and Steel Plants Paying Each of the Base Rates	Total No. of Wage Earners Employed by These Plants	Total No. of Common Laborers Receiving Each Base Rate
30.0	1	103	18
34.5 1/	3	653	221
35.3	1	458	125
36.0	1	250	---
36.5	1	2,487	437
38.0	1	342	121
40.0	5	1,355	215
42.0	1	163	9
43.0	2	227	110
45.0	7	7,631	988
46.0	1	300	60
46.5	2	1,008	160
48.0	1	135	24
48.2	1	186	38
48.5	3	523	210
49.0	1	165	38
49.5	1	63	13
50.0	7	1,656	233
50.05	1	178	110
51.0	1	335	23
52.0	2	406	77
52.5	1	130	13
53.0	4	2,312	150
54.0	4	2,451	265
55.0	11	6,746	623
56.0	4	2,710	720
56.25	1	162	25
56.5	21	38,947	3,965
57.0	5	4,005	194
58.0	3	1,666	110
58.5	5	11,005	917
59.5	8	9,745	1,128
60.0	13	7,278	438
60.5	1	750	20
62.5	101	200,466	14,669
63.0	3	4,961	277
63.5	1	501	47

Paid in Industry	Base Rates	These Plants	Base Rate
30.0	1	103	18
34.5 1/	3	653	221
35.3	1	458	125
36.0	1	250	---
36.5	1	2,487	437
38.0	1	342	121
40.0	5	1,355	215
42.0	1	163	9
43.0	2	227	110
45.0	7	7,631	988
46.0	1	300	60
46.5	2	1,008	160
48.0	1	135	24
48.2	1	186	38
48.5	3	523	210
49.0	1	165	38
49.5	1	63	13
50.0	7	1,656	233
50.05	1	178	110
51.0	1	335	23
52.0	2	406	77
52.5	1	130	13
53.0	4	2,312	150
54.0	4	2,451	265
55.0	11	6,746	623
56.0	4	2,710	720
56.25	1	162	25
56.5	21	33,947	3,965
57.0	5	4,005	194
58.0	3	1,666	110
58.5	5	11,005	917
59.5	8	9,745	1,128
60.0	13	7,278	438
60.5	1	750	20
62.5	101	200,466	14,669
63.0	3	4,961	277
63.5	1	501	43
65.0	2	283	11
70.0	1	222	64
Totals 2/	234	313,064	26,887

1/ This base rate, reported by the Rail Steel Bar Assn., is the average of the base rates paid by 3 member concerns located in the South.

2/ Included in these totals is a plant located in Virginia for which no base rate has been reported. This plant employs 100 wage earners of which 25 receive the common labor rate.

112 This table gives us a full-length view of the minimum wages paid in the iron and steel industry. The variation in these minimum rates is wide; the highest minimum is more than double the lowest and from low to high there are 39 different base rates for common labor. But more pronounced than the tendency among the base rates toward diversity is the evidence in the table of uniform minimum wage practice. Two of the 38 base rates account for 122 of the 234 plants. These 122 plants employ 76.5 per cent of all the workers in the wage sample and 69.3 per cent of all the workers classified as common laborers and paid base rate wages.

For the largest segment of the industry there is but one base rate, 62.5 cents an hour. Of the 234 plants, 101 pay this base rate. In these 101 plants are employed 64.0 per cent of all the workers in the wage sample and, what is more important for our purposes, 54.6 per cent of the common laborers in the sample are paid the 62.5-cent rate. These figures would be larger if we had statistics for the following companies reported by the SWOC to be paying the base rate of 62.5 cents an hour under union contract: Allegheny Steel Co., Jessop Steel Co., Otis Steel Co., Rotary Elec. Steel Co., and the Timken Steel & Tube Co. The table also shows that at other base rates there are smaller but substantial concentrations of workers. Eight plants employing 3.1 per cent of all the workers in the sample pay a base rate of 59.5 cents. This rate is paid to 4.2 per cent of the workers classified as common laborers.

Next to the 62.5-base rate, the rate of 56.5 cents is the most outstanding base rate in the table. 21 plants pay 56.5 cents to 14.7 per cent of the workers classified as common laborers. These 21 plants employ 12.4 per cent of all the workers in the wage sample. At lower rates there is no pronounced tendency toward concentration. Minor concentrations will be found at the rates of 56, 55, 54, 53 and 50 cents. Below 50 cents the outstanding concentration takes place at the 45-cent rate. Seven plants pay this rate and these plants employ 2.4 per cent of all the workers in the sample and 3.7 per cent of all the workers classified as common laborers.

We have only to compare the base rates with each other to see that none of the other base rates approaches the 62.5

cent rate in the number of plants in which this rate is paid, in the total number of workers in these plants and in the total number of workers receiving the rate. But the prevailing minimum wage is not to be found as simply as this. Something more than an inspection of the statistical table is required. There are other base rates of lesser but substantial importance below the 62.5 cent rate and we must take into account the wide geographic dispersion of the industry. It is necessary to go behind the statistical table and to look in more detail at the minimum wage structure of the industry.

A variety of economic factors operate to produce both the diversity among the base rates from 30 to 70 cents, and the uniformity at the relatively few points of concentration. Outstanding among these factors are the customs of the community or the region in which a plant is located with respect to the payment of high or low wages, the supply of labor capable of working in iron and steel plants, the competition of other industries in the locality for their labor supply, the nature of the product, the degree of mechanization and the efficiency of a plant, the costs of transporting raw materials and the transportation costs to market, the size of the iron and steel companies and the policy of the companies toward wages, the cost of living in a community, the extent and influence of organized labor in the various communities and regions.

113 Our concern is with the minimum wage structure of the industry as these economic factors have operated to produce it. It is not necessary, however, that we analyze the wage data in the table above in the light of each one of these factors in order to bring out the underlying structure of minimum wages in the industry as it now exists. The geographic location of the plants will reflect several of these wage-making factors, such as the custom of communities and regions, the labor supply, the cost of living, and the costs of transportation. The evidence in the record enables us to relate the various base rates and the location of each plant for which reports have been received. There is also evidence in the record with respect to the size of the companies and the size of the plants, the nature of the product of the various plants, and the degree of unionization in the industry.

In the following table the base rates are again arranged in a series from low to high and adjacent to each base rate is given the locations and names of the plants paying the base rate, together with the total number of workers in the plant and the number classified as common labor receiving the base rate. Following this table the plants paying each of the base rates are described in terms of geographic location, size of company and size of plant, nature of product, and, where a union agreement has been reported for a plant by the Steel Workers' Organizing Committee this fact is noted. The description of the plants in these terms will enable us to relate the diversities and uniformities among the base rates to each other and will guide us in interpreting the statistical table presented above on page 75.

Base Rates for Common Labor Being Paid in the Industry (cents)	Location of Plants Paying Each of the Base Rates	Name of Company Paying Each of the Base Rates	Total No. of Workers in Each Plant	Total No. of Common Laborers in Each Plant Being Paid Base Rate
30.0	Standish, N. Y.	[illegible]augay Ore & Iron Co.	103	18
34.5 1/	Birmingham, Ala. Knoxville, Tenn. Fort Worth, Texas	[illegible]ners Steel Co.) [illegible]xville Iron Co.) [illegible]s Steel Co.)	653	221
35.3	Richmond, Va.	[illegible] Tredegar Co.	458	125
36.0	Anniston, Ala.	[illegible]lby Steel Co.	250	---
36.5	Gadsden, Ala.	[illegible]public Steel Corp.	2,487	437
38.0	Newberry, Mich.	[illegible]berry Lumber & Chemical Co.	342	121
40.0	Birmingham, Ala. " " Woodward, Ala.	[illegible]public Steel Corp. [illegible]se-Sheffield Steel & Iron Co. [illegible]dward Iron Co.	360 423 572	84 44 87
42.0	Cohoes, N. Y.	[illegible]hoes Rolling Mill Co.	163	9
43.0	Reusens, Va. Pine Forge, Pa.	[illegible]. J. Lavino & Co. [illegible]ine Iron Works	175 52	91 19
45.0	Bessemer, Ala. Ensley, Ala. Fairfield, Ala. Pratt City, Ala.	[illegible]nnessee Coal, Iron & Railroad Co.	7,631	988
46.0	Troy, N. Y.	[illegible]urden Iron Co.	300	60

1/ This rate is the average of the base rates paid by the companies shown.

(continued)

46.5	Milton, Pa.	Milton Mfg. Co.	345	6
	Lebanon, Pa.	Wrought Iron Co.	663	154
48.0	Berwick, Pa.	American Car & Foundry Co.	135	24
48.2	Sand Springs, Okla.	Sheffield Steel Corp.	186	38
48.5	Syracuse, N. Y.	Eckels-Nye Steel Co.	80	16
	Lebanon County, Pa.	E. J. Lavino & Co.	180	95
	Williamsport, Pa.	Sweet's Steel Co.	263	99
49.0	Burnham, Pa.	Logan Iron & Steel Co.	165	38
49.5	Wareham, Mass.	Tremont Nail Co.	63	13
50.0	Philadelphia, Pa.	Henry Disston & Sons, Inc.	310	30
	Franklin, Pa.	Franklin Steel Works	212	15
	Parkersburg, W. Va.	Parkersburg Iron & Steel Co.	588	99
	Troy, N. Y.	Troy Furnace Corp.	196	37
	Dover, N. J.	Ulster Iron Works	250	35
	Wallingford, Conn.	Wallingford Steel Co.	---	---
	Worcester, Mass.	Worcester Pressed Steel Co.	100	17
50.5	Tonawanda, N. Y.	Buffalo Steel Co.	178	110
51.0	Marion, Ohio	Pollak Steel Co.	335	23
52.0	Troy, N. Y.	Rail Joint Co.	132	24
	Huntington, W.Va.	W. Va. Rail Co.	274	53
52.5	Branford, Conn.	The Atlantic Wire Co.	130	13
53.0	Apollo, Pa.	Apollo Steel Co.	1,000	60
	Baltimore, Md.	Eastern Rolling Mill Co.	446	78
	Erie, Pa.	Erie Forge Co.	241	3
	" "	Erie Forge & Steel Co.	625	9

(continued)

54.0	Birdsboro, Pa.	H. K. Brooke Iron Co.	215	47
	Harrisburg, Pa.	Central Iron & Steel Co.	1,210	153
	" "	Harrisburg Steel Corp.	779	35
	Baltimore, Md.	Rustless Iron & Steel Corp.	247	30
55.0	Bridgeport and New Britain, Conn.	The Stanley Works	639	56
	Indianapolis, Ind.	Chapman Price Steel Co.	393	32
	" "	Continental Steel Corp.	2,063	129
	Kokomo, Ind.	" " "		
	Worcester, Mass.	Johnson Steel & Wire Co.	273	50
	Holyoke, Mass.	Geo. L. Prentiss & Co.	150	15
	Kansas City and St. Louis, Mo.	Sheffield Steel Corp.	2,160	278
	Lockport, N. Y.	Simonds Saw & Steel Co.	368	49
	Canton, Ohio	Superior Sheet Steel Co.	700	14
56.0	Newport, Ky.	Andrews Steel Co.	2,500	680
	Morgantown, W. Va.) Philadelphia, Pa.)	Carnegie-Illinois Steel Corp.	71	32
	Moline, Ill.	Republic Steel Corp.	139	8
56.25	Jackson, Ohio	Globe Iron Co.	162	25
56.5	Allentown, Pa.) Bethlehem, Pa.) Coatesville, Pa.) Danville, Pa.) Lebanon, Pa.) Sparrows Point, Md.) Steelton, Pa.) Williamsport, Pa.)	American Steel & Wire Co.	713	23
		Bethlehem Steel Co.	28,952	2,574
	Newark, Ohio	Buckeye Rolling Mill Co.	53	23
	Harrison, N. J.) Jersey City, N. J.) Syracuse, N. Y.)	Crucible Steel Co. of America	3,571	601

(continued)

	Alton and Madison, Ill.	Laclede Steel Co.	825	88
	Coatesville, Pa.	Lukens Steel Co.	1,640	230
	Phoenixville, Pa.	Phoenix Iron Co.	1,200	58
	Chester, Pa.	South Chester Tube Co.	614	113
	Conshohocken, Pa.	Alan Wood Steel Co.	1,379	255
57.0	Kenilworth, N. J.	Carpenter Steel Co.	45	0
	Reading, Pa.	" " "	834	56
	Bridgeport, Conn.	Happenstal Co.	175	24
	Philadelphia, Pa.	Midvale Steel Co.	2,075	48
	Claymont, Del.	North Steel Co.	876	66
58.0	Los Angeles, Calif.	Bethlehem Steel Co.	553	24
	Torrance, Calif.	Columbia Steel Co.	942	68
	Worcester, Mass.	G. F. Wright Steel & Wire Co.	171	18
58.5	Johnstown, Pa.	Bethlehem Steel Co.	7,649	515
	" "	Carnegie-Illinois Steel Corp.	1,237	88
	Cambridge, Ohio	" " " "	30	17
	Granite City, Ill.	Granite City Steel Co.	2,089	297
59.5	Buffalo, N. Y.	Bethlehem Steel Co.	6,853	603
	Chicago Heights, Ill.	Calumet Steel Co.	470	62
	Elwood, Ind.	Carnegie-Illinois Steel Corp.	272	272
	Philadelphia, Pa.	Ellwood Ivin's Steel Tube Works	24	5
	Buffalo, N. Y.	Hanna Furnace Corp.	395	45
	Chicago Heights, Ill.	Inland Steel Co.	368	74
	Buffalo, N. Y.	Republic Steel Corp.	1,338	59
	N. Tonawanda, N. Y.	Tonawanda Iron Corp.	25	8
60.0	Anderson, Ind.)	American Steel & Wire Co.	1,550	96
	DeKalb, Ill.)			
	Joliet, Ill.)			
	Duluth, Minn.	" " " " "	1,303	97
	San Francisco, Calif.)	Bethlehem Steel Co.	1,037	21
	Seattle, Wash.)			

(continued)

	N. Tonawanda, N. Y.	Buffalo Bolt Co.	856	96
	Joliet, Ill.	Carnegie-Illinois Steel Corp.	50	7
	Pittsburgh, Calif.)			
	Scranton, Utah)	Colbia Steel Co.	2,289	119
	Monaca, Pa.	Pittsburgh Tube Co.	193	2
60.5	Dover, Ohio	Reeves Steel & Mfg. Co.	750	20
62.5 2/	Ashland, Ky.)			
	Columbus, Hamilton.)	American Rolling Mill Co.	8,809	337
	Middletown and)			
	Zanesville, Ohio)			
	Butler, Pa.)			
	Waukegan, Ill.	American Steel & Wire Co.	1,430	20
	Cleveland, Ohio	" " " " "	3,328	69
	Donora and Rankin, Pa.	" " " " "	3,190	150
	New Haven, Conn.)			
	Trenton, N. J.)	" " " " "	3,602	115
	Worcester, Mass.)			
	Braeburn, Pa.	Braeburn Alloy Steel Corp.	160	16
	S. Chicago, Ill.)			
	Gary, Ind.)	Carnegie-Illinois Steel Corp.	29,161	3,133
	Bessemer, Pa.)			
	Canton, Ohio)			
	Clairton, Pa.)			
	Duquesne, Pa.)			
	Etna, Pa.)			
	Farrell, Pa.)			
	Irvin, Pa.)			
	McKeesport, Pa.)			
	Martins Ferry, Ohio)	" " " "	38,607	1,991
	Mingo Junction, Ohio)			
	Munhall, Pa.)			
	New Castle, Pa.)			
	Scottdale, Pa.)			
	Vandergrift, Pa.)			
	Youngstown, Ohio)			

Cont'd. 62.5 2/	Pittsburgh, Pa.	Crucible Steel Co. of America	4,346	549
	McKeesport, Pa.	Firth-Sterling Steel Co.	675	25
	Youngstown, Ohio	The Fitzsimmons Co.	72	22
	Indiana Harbor, Ind.	Inland Steel Co.	9,726	304
	Aliquippa, Pa.	Jones & Laughlin Steel Corp.	9,247	573
	Pittsburgh, Pa.	" " " " "	6,843	1,313
	Latrobe, Pa.	Latrobe Electric Steel Co.	529	39
	Washington, Pa.	Molybdenum Corp. of America	74	15
	Gary, Ind.	National Tube Co.	99	0
	Lorain, Ohio	" " "	7,456	17
	Ellwood City, Pa.	" " "	2,394	0
	McKeesport, Pa.	" " "	3,334	1
	Pittsburgh, Pa.	Pittsburgh Steel Co.	5,189	430
	Chicago, Ill.	Republic Steel Corp.	1,238	109
	Monroe, Mich.	Republic Steel Corp.	560	32
	Canton, Ohio Cleveland, Ohio Massillon, Ohio Niles, Ohio Warren, Ohio Youngstown, Ohio	" " "	17,337	916
	Pittsburgh, Pa.	" " "	181	14
	Lowellville, Ohio Youngstown, Ohio Sharon, Pa.	Sharon Steel Corp.	1,786	196
	Steubenville, Ohio	Weirton Steel Co.	1,015	186
	Weirton, W. Va.	" " "	8,080	1,136
	Martins Ferry, Ohio Portsmouth, Ohio Steubenville, Ohio Yorkville, Ohio	Wheeling Steel Corp.	13,727	1,546
	Beech Botton, W.Va. Benwood, W. Va. Wheeling, W. Va.	" " "	3,132	671

2/ In addition to the companies shown for this rate, the S.W.O.C. reports that it has contracts with the following concerns paying a base rate for common labor of 62.5¢ per hour: Allegheny Steel Co., Brackenridge and West Leechburg, Pa.; Jessop Steel Co., Washington, Pa.; Otis Steel Co., Cleveland; Rotary Electric Steel Co., Detroit; and the Timken Steel & Tube Co., Canton, Gambrinus and Wooster, Ohio.

(continued)

	Chicago, Ill.	Wilson Steel & Wire Co.	201	74
	Chicago, Ill. & vicinity	Youngstown Sheet & Tube Co.	5,130	321
	Youngstown, Ohio and vicinity	" " " "	9,808	349
63.0	Delray and Ecorse, Mich. (Detroit area)	Great Lakes Steel Corp.	4,961	277
63.5	Pittsburgh, Pa.	Heppenstall Co.	501	43
65.0	San Francisco, Calif.	Columbia Steel Co.	90	3
	Dearborn, Mich.	Detroit Seamless Steel Tubes Co.	193	8
70.0	Detroit, Mich.	Detroit Steel Corp.	222	64

121 The lowest base rate reported for the record, 30 cents, is paid by a small company whose plant is located in a rural community some 200 miles north of New York City. There are no other iron and steel plants within a radius of approximately 75 miles of Standish. The plant is small and has capacity to produce pig iron only. This annual capacity is 100,000 tons.

The next higher base rate, 34.5 cents, has been reported as an average for three small companies by the Rail Steel Bar Association. In the analysis above in section V we have listed these three companies as non-reported in view of the lack of specific data for each company. However, we may take this average base rate as an indication of the wages paid by the three companies. The three companies have their plants in the South. One is located in Birmingham, a second in Knoxville, and the third in Forth Worth. The total employment in the three plants amounts to only 653 workers, and the capacity of the plants to produce is small. The Connors Steel Company has an annual capacity for 60,000 tons of finished hot rolled products; The Knoxville Iron Company, 80,000 tons; and the Texas Steel Company, 6,000 tons of ingots and 18,000 tons of finished hot rolled products. The Birmingham plant is located in the principal producing center in the South. The Knoxville plant is approximately 250 miles from the Birmingham area and is not adjacent to any other producing center. The Texas plant is geographically isolated, being approximately 300 miles from the nearest steel plant.

The base rate of 35.3 cents is paid by one small company located in Richmond, Virginia. It should be noted that this base rate is the weighted average of several common labor rates reported by the Tredegar Company. The plant has a small capacity to produce finished hot rolled products, 44,000 tons. This company operates in the area occupied by other plants but the iron and steel industry in Virginia is small.

The base rate of 36 cents is paid by a single small company located in Alabama, 60 miles from the Birmingham producing center. The plant is small, having an annual capacity of 10,000 tons of ingots and 54,000 tons of finished hot rolled products. No figure has been reported showing the number of workers receiving the 36-cent rate.

The 36.5-cent base rate is paid by the large Republic Steel Corporation in its plant at Gadsden, Alabama. Gadsden is located at a distance of some 65 miles from the Birmingham area. With the exception of The Tennessee Coal, Iron and Railroad Company, the plant at Gadsden is the only plant in the South producing the whole range of pig iron, steel ingots and finished hot rolled products. The Gadsden plant is large for the South, having capacity for 180,000 tons of pig iron, 400,500 tons of steel ingots and 297,600 tons of finished hot rolled products. The Republic works at Gadsden employs by far the largest number of workers and the largest number of common laborers at the base rate of any company or plant with a base rate below 45 cents.

122 For the 38-cent base rate the location shifts from the South to the northern part of Michigan. A small company operates a plant at Newberry, approximately 300 miles north of Detroit. There are no other plants within long distances of this plant, although it should be observed that Newberry is located only a short distance from the Great Lakes. The plant has a small capacity to produce pig iron, 29,000 tons.

Three moderately large producers of pig iron located in or near Birmingham, Alabama, pay the 40-cent base rate. The large Republic Steel Corporation owns the smallest of these three plants, the pig iron capacity amounting to 320,000 tons. The other two companies may be classed as moderate in size. The Woodward Iron Company has two plants and a total pig iron capacity of 465,000 tons. The Sloss-Sheffield Steel and Iron Company also has two plants with a total pig iron capacity of 584,000 tons. These plants are, of course, situated in the immediate vicinity of the largest center of iron and steel production in the South. Of the three companies paying the 40-cent base rate, the Steel Workers' Organizing Committee reports an agreement with the Woodward Iron Company. This is the only agreement reported by the union for any plant in the industry in which the base rate is below 45 cents an hour.

For the company paying the 42-cent rate we must again look to the North. This rate is paid by the small Cohoes Rolling Mill Company in its plant at Cohoes, New York. The Cohoes plant is small, having capacity to produce

30,000 tons of finished hot rolled products. Cohoes is situated in the vicinity of Troy where there are several other iron and steel plants.

The two plants paying the 43-cent base rate are located in different parts of the country. The E. J. Lavino Company is a small company also operating a plant in Sheridan, Pennsylvania where the base rate is 48.5 cents. The Lavino plant at Reusens, Virginia is a small producer of pig iron, having a capacity of 36,000 tons. Reusens is approximately 100 miles west of Richmond. The Pine Forge Iron Works is a small company with its plant at Pine Forge, Pennsylvania. This plant has a small capacity for finished hot rolled products, 12,000 tons in all. Pine Forge is located within 50 miles north of Philadelphia in a rural community. In this general area, however, there is a considerable development of the iron and steel industry.

The largest concentration of workers receiving base rates which are listed in the lower portion of the above table is found at the base rate of 45 cents. This rate is paid in the seven plants of The Tennessee Coal, Iron and Railroad Company, a subsidiary of the United States Steel Corporation. These plants are the largest in the South; in fact, they account for the largest part of the industry in the South. They have capacity for 1,604,000 tons of pig iron, 1,802,000 tons of ingots and 1,336,800 tons of finished hot rolled products. The plants are located in and around Birmingham, Alabama. In the table above on page 75 it will be seen that the largest concentration of all workers and those classified as common laborers at any base rate below 56.5 cents takes place at the 45-cent rate. The Steel Workers' Organizing Committee has reported collective agreements for the plants of The Tennessee Coal, Iron and Railroad Company.

The 46-cent base rate brings us back North again. With the exception of the 48.2 rate, all of the rates above 45 cents are to be found in the North. The Burden Iron
123 Company which pays the 46-cent rate is a small company operating a small plant at Troy, New York. Other iron and steel plants are located in this vicinity. The Burden plant has capacity for 24,000 tons of finished hot rolled products.

Both plants paying the 46.5-cent rate are located in Pennsylvania, one in Milton and the other in Lebanon. Milton is approximately 70 miles north of Harrisburg, and Lebanon is 26 miles to the East. Although located in smaller communities, these plants are situated in a territory marked by a considerable development of the iron and steel industry. The Milton Manufacturing Company is a small company and the Milton plant is small, its capacity to produce being 30,000 tons of finished hot rolled products. The Wrought Iron plant at Lebanon is larger, its capacity being 75,000 tons of finished hot rolled products, but both the plant and the company may be classified as small.

The 48.0-cent rate is paid in a non-industrial Pennsylvania community, which, however, is not more than 50 miles from other centers of steel production. The steel operations of the American Car and Foundry Company would be classed as small. The plant has a capacity for 48,000 tons of finished hot rolled products. The company reports that the minimum rate is the result of collective bargaining with representatives chosen by the employees (R 750).

The highest base rate paid in any Southern State is the 48.2-cent rate in Oklahoma which is on the border between the North and the South but has been regarded here as a Southern State. The plant is located at Sand Springs, Oklahoma, a considerable distance from any iron and steel-producing center. The nearest plants are in Fort Worth and in Kansas City. The company which operates the plant, The Sheffield Steel Company, is moderate in size and is a subsidiary of the American Rolling Mill Company, one of the large companies in the industry. The plant is small, having a capacity to produce 50,000 tons of steel ingots and 35,000 tons of finished hot rolled products. The rate of 48.2 cents has been computed as the average base rate from the data submitted by the company.

Three small companies pay the 48.5-cent base rate. The Eckels-Nye Steel Company is located at Syracuse, New York, where there are other iron and steel plants. Both the Lavino plant and Sweet's Steel Company are located in non-industrial Pennsylvania communities but both are within a radius of 100 miles of important iron and steel-producing centers. The three plants are small. The

Eckels-Nye plant has a capacity to produce 10,200 tons of finished hot rolled products, and Sweet's Steel plant, 60,000 tons of these products. The Lavino plant has a capacity to produce 36,000 tons of pig iron.

The 49-cent rate is paid in a single plant operated by the Logan Iron and Steel Company in Burnham, Pennsylvania, near Harrisburg. Both the company and the plant may be classed as small. The plant has a capacity to produce 45,000 tons of finished hot rolled products. The plant is located in a non-industrial community but it is not far from centers of iron and steel production.

A small company in Massachusetts, the Tremont Nail Company at Wareham, pays the base rate of 49.5 cents. This plant has a capacity to produce 3,000 tons of nails.

The 50-cent base rate is paid by 7 companies listed
124 in our wage sample. Two are located in Pennsylvania, one in West Virginia, one in New York, one in New Jersey and two in New England. None of these plants is located outside an industrial community. The steel operations of the Henry Disston Company are not large, the capacity being 22,700 tons of ingots and 34,500 tons of finished hot rolled products. The other companies and plants are small. The Franklin Steel Works has a capacity for 45,000 tons of finished hot rolled products; the Parkersburg Iron and Steel Company, 32,100 tons of like products; the Troy Furnace Company, a capacity for 150,000 tons of pig iron; the Ulster Iron Works, a capacity for 16,000 tons of finished hot rolled products; the Wallingford Steel Company, 20,400 tons of cold rolled strip; and the Worcester Pressed Steel Company, 6,750 tons of the same product. The Steel Workers' Organizing Committee has reported a collective agreement for the Henry Disston and Sons Company.

The 50.5-cent rate is paid by a small company operating a plant in the vicinity of Buffalo, New York. This plant has a capacity of 36,000 tons for finished hot rolled products.

A small company with a plant located at Marion, Ohio, pays the base rate of 51 cents. Marion is approximately 150 miles from the Youngstown producing center. The plant has a capacity for 40,000 tons of finished hot rolled products.

The two plants paying the 52-cent base rate are some distance apart. Both, however, are located in industrial communities. The companies and the plants are small. The Rail Joint Company plant at Troy, New York has a capacity to produce 10,000 tons of finished hot rolled products and the West Virginia Rail plant at Huntington, West Virginia, 125,000 tons of these products.

A small company operating a small wire plant in Connecticut pays the 52.5-cent rate. The Atlantic Wire Company at Branford has a capacity to produce 22,500 tons of wire.

The 53-cent rate is paid in the Erie, Pennsylvania plants, in a plant near Pittsburgh, and in a plant in Baltimore. The companies operating these plants are small, and the plants themselves are small. The Apollo Steel Company at Apollo, Pennsylvania has a capacity to produce 120,000 tons of finished hot rolled products. Both Erie plants have small ingot capacities, one 48,000 tons and the other 75,000 tons. The Eastern Rolling Mill plant in Baltimore has a capacity for 90,000 tons of finished hot rolled products. The Baltimore plant is immediately adjacent to other steel mills. The Apollo, Pennsylvania plant is situated within 25 miles of Pittsburgh and the Erie plants are located at approximately equidistant mileages from the Pittsburgh, Buffalo, and Cleveland areas. The Steel Workers' Organizing Committee has reported an agreement with the Eastern Rolling Mill Company in Baltimore.

The base rate of 54 cents is paid in 4 plants. Two of the plants are in Harrisburg, Pennsylvania and one is located at Birdsboro, which is near Philadelphia. The fourth plant is located in Baltimore. The Central Iron and
125 Steel Company is the largest of these companies and may be classified as a medium-size company. Its plant at Harrisburg has a capacity for 300,180 tons of ingots and 214,300 tons of finished hot rolled products. The other Harrisburg company is small. Its plant has a capacity for 77,500 tons of ingots and 75,000 tons of finished hot rolled products. The Brooks Iron Company is small. Its plant has pig iron capacity only; this amounts to 132,000 tons. The Rustless Iron and Steel Corporation is also small. Its plant at Baltimore has capacity for 23,000 tons of ingots and 14,000 tons of finished hot rolled products.

The plants in which the 54-cent rate is paid are all in the Eastern part of the country. They are located in the immediate neighborhood of important producing centers.

The 55-cent base rate is paid in 11 plants, 4 of which are located in New England. The 3 operating companies in New England are small and the plants are likewise small. The Stanley Works at Bridgeport and New Britain, Connecticut has capacity to produce 114,800 tons of ingots and 92,500 tons of finished hot rolled products. The other two New England companies are small producers of wire. The Geo. W. Prentiss Company at Holyoke, Massachusetts has capacity for 8,400 tons and the Johnson Steel and Wire Company, capacity for 10,000 tons. The New England plants paying the 55-cent rate are located in industrial centers.

The other plants paying the 55-cent rate are rather widely separated. One is located at Lockport, New York in the Buffalo vicinity. The steel operations of the Simonds Saw and Steel Company are small, the plant having capacity for 12,000 tons of ingots and 6,850 tons of finished hot rolled products. This plant is located in the immediate vicinity of an important iron and steel-producing center.

Another plant with the 55-cent base rate is located in Canton, Ohio. The plant is small, having capacity for 72,000 tons of finished hot rolled products; the company, The Superior Sheet Steel Company, is a subsidiary of the Continental Steel Corporation of Kokomo, Indiana. The plant is located in the vicinity of large iron and steel operations.

In the central part of Indiana the 55-cent rate is paid in 3 plants. One of these, The Chapman Price Steel Company, another subsidiary of Continental Steel, is a small producer of black and galvanized sheets, having a capacity of 50,000 tons. The Continental Steel Corporation, with plants at Kokomo and Indianapolis, also pays this rate. This company may be regarded as one of the larger companies in the small classification. The plant at Indianapolis is small, having capacity for 44,600 tons of finished hot rolled products. The Kokomo plant is larger with capacity to produce 280,000 tons of ingots and 210,000 tons of finished hot rolled products. These plants are located within 150 miles of Gary, Indiana, and in the vicinity of other iron and steel plants.

The Sheffield Steel Corporation at its plants in Kansas City and St. Louis also pays the 55-cent base rate. This company is moderate in size but is a subsidiary of the American Rolling Mill Company, one of the large companies in the industry. The Kansas City plant has capacity to produce 232,400 tons of ingots and 240,200 tons of finished hot rolled products. The St. Louis plant has capacity to produce 204,100 tons of the former and 206,600 tons of the latter products. The Kansas City plant is removed some 250 miles from the nearest producing center, St. Louis.

126 The Steel Workers' Organizing Committee has reported union agreements with the Superior Sheet Steel Company at Canton, the Continental Steel Corporation at Indianapolis and Kokomo, and the Chapman Price Steel Company at Indianapolis. The Sheffield Steel Corporation reports a collective bargaining agreement at the Kansas City plant with the Amalgamated Association of Iron, Steel and Tin Workers (R 568).

The 56-cent base rate is paid in the plants of one medium-sized company, The Andrews Steel Company, and two large companies, the Carnegie-Illinois Steel Corporation and the Republic Steel Corporation. The Andrews Steel Company plant is located at Newport, Kentucky near Cincinnati, Ohio and in the vicinity of other iron and steel plants. The Andrews plant is medium-sized, having a capacity for 360,000 tons of ingots and 90,000 tons of finished hot rolled products. The Morgantown, West Virginia plant of the Carnegie-Illinois Steel Corporation has capacity for 37,000 tons of finished hot rolled products. For the Carnegie-Illinois plant in Philadelphia the capacity figures are not given above in section V, but from the small number employed we may assume that this is a small plant. The Moline, Illinois plant of the Republic Steel Corporation is small, having capacity to produce 51,000 tons of finished hot rolled products. This plant is located approximately 150 miles from Chicago and is not in the immediate vicinity of other iron and steel plants. The Steel Workers' Organizing Committee has reported union agreements with the Andrews Steel Company and the Carnegie-Illinois Steel Corporation for the plants in which the 56-cent base rate is paid.

A single small company, The Globe Iron Company, pays the 56.25 base rate. The plant is small and has capacity to produce 90,000 tons of pig iron. The plant is located at Jackson in the south central part of Ohio. It is not far removed from large iron and steel-producing centers.

The second largest concentration of plants, total number of workers employed in plants at any one base rate, and number of common laborers paid any one base rate, is found at 56.5 cents an hour. This is the base rate in 21 plants, and 9 companies operate these plants. Large, medium and small-sized companies pay the 56.5-cent rate. The American Steel and Wire Company is a subsidiary of the United States Steel Corporation. The Bethlehem Steel Company is the second largest company in the industry. The Crucible Steel Company is one of the largest medium-sized companies in the industry. The Alan Wood Steel Company and the Lukens Steel Company are medium-sized and the Laclede Steel Company, the Phoenix Iron Company, the South Chester Tube Company, and the Buckeye Rolling Mill Company are small.

The plants in which this rate is paid are likewise large, medium and small-sized establishments. The American Steel and Wire plant at Allentown is small, having capacity for 105,000 tons of finished hot rolled products. The plants of the Bethlehem Steel Company vary in size from the extremely large plant at Sparrows Point, Maryland to the small plant at Coatesville, Pennsylvania. The capacity to produce of the Bethlehem Steel plants in which the 56.5-cent rate is paid is 3,553,200 tons of pig iron, 4,940,000 tons of ingots, and 3,512,100 tons finished hot rolled products.

127 The plant of the Buckeye Rolling Mill Company at Newark, Ohio is small. It has capacity for 25,000 tons of finished hot rolled products. The two plants of the Crucible Steel Company at Syracuse are small. Together they have capacity for 66,700 tons of ingots, and 37,445 tons of finished hot rolled products. Likewise, the Crucible Steel plants in New Jersey are small. Together they have capacity for 86,700 tons of ingots, 82,000 tons of finished hot rolled products, 3,300 tons of wire and 5,400 tons of cold rolled strip.

The Laclede plant at Alton, Illinois is one of the larger plants in the small classification, having capacity for

235,400 tons of ingots and 128,550 tons of finished hot rolled products. The other Laclede plant at Madison is small. It has capacity for 103,000 tons of finished hot rolled products. The Lukens Steel plant at Coatesville, Pennsylvania is substantial in size. Its productive capacity is 840,000 tons of ingots and 441,000 tons of finished hot rolled products. The Phoenix Iron Plant at Phoenixville, Pennsylvania is one of the larger plants in the small classification, having capacity of 208,000 tons of ingots and 173,600 tons of finished hot rolled products.

The capacity of the South Chester Tube Company at Chester, Pennsylvania, is limited to the production of pipe. The capacity of the plant is 62,000 tons. The Alan Wood Steel Company operates plants of substantial size at Conshohocken, Pennsylvania. The 3 Alan Wood plants have a capacity of 406,080 tons of pig iron, 660,000 tons of ingots, and 238,000 tons of finished hot rolled products.

It will be noted that most of these plants are located in eastern Pennsylvania. The Sparrows Point plant of Bethlehem Steel and the Harrison and Jersey City plants of Crucible Steel are located in the same general area as the eastern Pennsylvania plants. The Syracuse, New York plants of Crucible Steel are located outside this area, Syracuse being some 200 miles north of Bethlehem, Pennsylvania. The other plants outside the Eastern area are the Buckeye Rolling Mill plant in Ohio and the Laclede Steel plants in Illinois.

None of the plants paying the 56.5 base rate is in any sense geographically isolated from other iron and steel plants. Distances in the Eastern area between these plants are relatively small. Syracuse is the farthest removed from important producing centers of any of the Eastern localities in which the 56.5 rate is paid. Newark, Ohio is somewhat removed from other Ohio-producing areas, but neither Syracuse nor Newark occupy separate geographical positions in the industry. The Laclede plants are located in the immediate vicinity of St. Louis, Missouri which is a small iron and steel-producing center.

The Steel Workers' Organizing Committee has reported union agreements for the plants of the American Steel and Wire Company at Allentown; the Crucible Steel plants at Harrison, Jersey City and Syracuse; the Lukens plant at

Coatesville; and the Alan Wood plants at Conshohocken. The South Chester Tube Company reports an employment contract with the Amalgamated Association of Iron, Steel and Tin Workers of North America (R 1355).

128 The 57-cent rate is paid in plants located exclusively in the eastern part of the United States. Two of the plants are located in the Philadelphia vicinity. These are the Worth Steel Company at Claymont, Delaware and the Midvale Steel Company at Philadelphia. The Carpenter Steel Company pays the 57-cent rate at its plants in Reading, Pennsylvania and Kenilworth, New Jersey. The fifth plant is located in Bridgeport, Connecticut and is operated by the Heppenstal Company which also has a plant in Pittsburgh at which the 63.5-cent base rate is paid. The Worth Steel Company may be classified as moderate in size, and the other companies as small. The capacity of the Carpenter Steel plant at Kenilworth is not given in section V above but at Reading the plant has capacity for 39,200 tons of ingots and 28,000 tons of finished hot rolled products. The Midvale plant at Philadelphia is relatively large in size, having capacity for 273,000 tons of ingots and 65,400 tons of finished hot rolled products. The Worth Steel plant at Claymont, Delaware is also moderately large in size, having capacity for 378,000 tons of ingots and 252,000 tons of finished hot rolled products. The Heppenstal plant at Bridgeport has a capacity to produce 6,000 tons of forgings. The Steel Workers' Organizing Committee reports an agreement in the Heppenstal plant.

The 58-cent base rate is paid in plants separated by the width of the continent. Two of the plants are located in and around Los Angeles, California and one is in Worcester, Massachusetts. The Pacific Coast Steel Company in Los Angeles is a subsidiary of the Bethlehem Steel Company and the Columbia Steel Company nearby is a subsidiary of the United States Steel Corporation. The G. F. Wright Steel and Wire Company is small.

The three plants are small. The G. F. Wright plant has capacity for 13,000 tons of wire. The Pacific Coast Steel plant has an ingot capacity of 85,000 tons and finished hot rolled products capacity of 66,500 tons. The Columbia Steel plant is about twice as large with an ingot capacity of 171,500 tons and finished hot rolled products capacity of 125,500 tons.

The G. F. Wright plant is located in the immediate vicinity of other plants. The nearest plants outside the Los Angeles area are located in and around San Francisco, approximately 400 miles away.

The Steel Workers' Organizing Committee reports a union agreement in the Columbia Steel plant at Torrance, California.

There is some regional diversity in the payment of the 58.5-cent base rate. The Granite City Steel plant is located in the immediate neighborhood of St. Louis. The Carnegie-Illinois plant at Cambridge, Ohio is outside the immediate vicinity of the large producing centers but this distance is not more than 50 miles. The two plants at Johnstown, Pennsylvania, the Bethlehem plant and the Carnegie-Illinois plant, are *not* over 60 miles from the Pittsburgh vicinity. The Carnegie-Illinois and the Bethlehem companies are large. The Granite City Steel Company may be classified as medium-sized.

The Bethlehem plant at Johnstown is very large. It has capacity of 1,332,000 tons of pig iron, 1,670,000 tons of ingots, and 1,143,000 tons of finished hot rolled products. The capacity of the Carnegie-Illinois plant is not given above in section V, but it is much smaller. The Cambridge, Ohio plant is small, with capacity for 95,900 tons of finished hot rolled products. The Granite City plant is medium-sized, having capacity for 400,000 tons of ingots and 275,000 tons of finished hot rolled products.

129 The Steel Workers' Organizing Committee has reported a union agreement for the two Carnegie-Illinois plants. The Granite City Steel Company reports a contract with the Amalgamated Association of Iron, Steel and Tin Workers of North America (R 703).

The table above on page 75 shows that at the 59.5-cent base rate there is a minor concentration of plants and workers. Four of the plants are located in the Buffalo area, two in the Chicago area, one in Elwood, Indiana, and one in Philadelphia.

Two large companies operate plants in the Buffalo area. —The Bethlehem Steel Company and the Republic Steel Corporation. The Hanna Furnace Corporation, also in Buffalo, is a subsidiary of the National Steel Corporation. The Tonawanda Iron Corporation may be classified as

small. The Elwood, Indiana plant is operated by Carnegie-Illinois. The large Inland Steel Company operates a plant in Chicago Heights. The Calumet Steel Company is small, as is the Ellwood Ivin's Steel Tube Works.

The Bethlehem plant at Buffalo is very large. The pig iron capacity is 1,490,400 tons, the ingot capacity 2,370,000 tons, and the finished hot rolled capacity 1,649,000 tons. The Republic plant at Buffalo is also large, having a pig iron capacity of 450,000 tons, an ingot capacity of 566,000 tons and a finished hot rolled capacity of 351,000 tons. The Hanna Furnace plant has a large pig iron capacity, 674,700 tons. The Tonawanda Iron Corporation has a pig iron capacity of 162,000 tons.

The Elwood, Indiana plant of the Carnegie-Illinois Steel Corporation is small, having a finished hot rolled capacity of 77,800 tons. This plant also produces tin plate in the amount of 153,500 tons. The plants at Chicago Heights are both small. The Inland Steel plant has 90,000 tons capacity for finished hot rolled products and the Calumet Steel plant a like capacity of 50,000 tons. The Ellwood Ivin's plant in Philadelphia is very small, having a capacity to produce 1,350 tons of cold drawn seamless tubes.

The plants paying the 59.5-cent rate are located in or near important centers of production, Buffalo, Chicago, and Philadelphia. The Elwood, Indiana plant is the farthest removed from a large producing center, it being approximately 150 miles from Gary. However, in central Indiana there is a small producing center and Elwood is located in this vicinity.

The Steel Workers' Organizing Committee reports a union agreement in the Elwood, Indiana plant.

The 60-cent base rate is a point of minor concentration in the table on page 75 in so far as plants and total number of employees are concerned. The number of workers receiving this base rate, however, is not exceptional. This latter fact is due to the relatively small proportion in some of the plants of common labor paid the base rate compared with the total number of workers in the plant. The American Steel and Wire plants have 6.8 per cent of the workers at the base rate; the Bethlehem Steel Company, 2.0 per cent; the Columbia Steel Company, 4.8 per cent; and the Pittsburgh Tube Company, 1 per cent. Only in the Buffalo

Bolt plant and the Carnegie-Illinois plant does the percentage exceed 10 per cent.

The American Steel and Wire Company, the Carnegie-Illinois Steel Corporation, and the Columbia Steel Company are subsidiaries of the United States Steel Corporation. The Bethlehem Steel Corporation is the other large company paying the 60-cent rate. The Buffalo Bolt Company and the Pittsburgh Tube Company are small.

None of the plants paying the 60-cent base rate is especially large, excepting the Carnegie-Illinois plant at Joliet. It has a capacity for 483,000 tons of pig iron; 475,000 tons of ingots, and 358,500 tons of finished hot rolled products. However, the number of workers reported for this plant in the summer of 1938 was very small. The Columbia Steel plant at Pittsburg, California is moderate in size, with ingot capacity of 192,000 tons and finished hot rolled capacity of 135,900 tons, The Columbia plant at Ironton, Utah has a capacity to produce 172,000 tons of pig iron. The Bethlehem plant at San Francisco is also moderate in size, having 155,000 tons of ingot capacity and 132,000 tons of finished hot rolled capacity.

The American Steel and Wire plant at Anderson is not large. Its capacity is 105,000 tons of finished hot rolled products. The plant at DeKalb has capacity to produce 146,950 tons of wire, 38,400 tons of wire nails, and 31,250 tons of wire fencing. At Joliet the plants have capacity to produce 360,700 tons of wire and nails. The plant at Duluth is medium-sized, having capacity of 300,000 tons of ingots and 220,000 tons of finished hot rolled products.

The Bethlehem plant at Seattle is moderate in size. The capacity is 140,000 tons of ingots and 119,000 tons of finished hot rolled products. The Pittsburgh Tube plant has a capacity to produce 73,200 tons of pipe. The Buffalo Bolt plant has capacity for 65,000 tons of finished hot rolled products.

Plants paying the 60-cent base rate are located across the entire country. The Buffalo Bolt Company is located in the vicinity of Buffalo. On the West Coast are located the Bethlehem plants at San Francisco and Seattle. A Columbia Steel plant is located in the San Francisco area and there is a Columbia plant in Utah. Between these

extremes are found the American Steel and Wire plants in the Chicago vicinity, in Anderson, Indiana and in Duluth, Minnesota. The Carnegie-Illinois plant at Joliet is near Chicago. The Pittsburgh Tube plant at Monaca is in the Pittsburgh vicinity.

The Anderson, Indiana plant is about 150 miles from Gary and is adjacent to other plants in central Indiana. DeKalb and Joliet are close to Chicago. The Pennsylvania plant is practically in Pittsburgh. The other plants are more isolated. Duluth is approximately 500 miles from Chicago and there is little in the way of an iron and steel industry between these cities. However, Duluth is located on the Great Lakes and has water transportation open to it.

The San Francisco vicinity is the home of the principal development of the industry on the West Coast but the nearest plants outside this vicinity are in Los Angeles, Seattle and Utah. The distances separating the Seattle and Utah plants from other plants in the West are hundreds of miles.

There is evidence in the record which indicates that the medium-sized Colorado Fuel and Iron Company pays the base rate of 60 cents (R 602). The plants, located at Pueblo, Colorado, have capacity to produce 563,000 tons of pig iron, 888,000 tons of ingots and 663,500 tons of
131 finished hot rolled products. The Colorado Fuel and Iron plants are separated by long distances from other producing centers. It is approximately 1,000 miles westward to the Coast and 1,000 miles eastward to Chicago. The development of the industry on either side of the Colorado Company is very sparse.

The Steel Workers' Organizing Committee has reported union agreements in the American Steel and Wire plants, in the Columbia Steel plants, and in the Carnegie-Illinois plant.

The base rate of 60.5 cents is paid in the Reeves Steel and Manufacturing Company in Dover, Ohio. This is a small company. Its plant has a capacity for 50,000 tons of finished hot rolled products. Dover is adjacent to the Cleveland-Youngstown-Canton producing area.

The predominating base rate in the table above on page 75 is the 62.5-cent rate. This rate is paid by the American

Rolling Mill Company, the American Steel and Wire Company, the Carnegie-Illinois Steel Corporation, Inland Steel Company, Jones and Laughlin Steel Corporation, The National Tube Company, Republic Steel Corporation, Weirton Steel Company, Wheeling Steel Corporation, and the Youngstown Sheet and Tube Company. With one exception, the companies named constitute the list of largest companies reporting wage data for the record. The only large company that does not pay the 62.5-cent base rate in any of its plants is the Bethlehem Steel Company. The National Tube Company is a subsidiary of the United States Steel Corporation and the Weirton Steel Company is a subsidiary of the National Steel Corporation.

Medium and small-sized companies also pay the 62.5-cent rate. The Crucible Steel Company of America, the Sharon Steel Corporation, the Pittsburgh Steel Company, the Allegheny Steel Company, the Otis Steel Company, and the Timken Steel and Tube Company are medium-sized. Small companies paying this rate are the Braeburn Alloy Steel Corporation, Firth-Sterling Steel Company, the Fitzsimmons Company, Latrobe Electric Steel Company, Molybdenum Corporation of America, Wilson Steel and Wire Company, the Jessop Steel Company, and the Rotary Electric Steel Company.

The plants in which the 62.5-cent base rate is paid are large, medium and small-sized. The principal iron and steel operations of the companies mentioned above are carried on in plants paying this rate. We will not attempt to give in detail here the capacity to produce possessed by these plants. It will be sufficient to give the total productive capacity for all of the plants of these companies in which the 62.5-cent rate is paid.

paying this rate. We will not attempt to give in detail here the capacity to produce possessed by these plants. It will be sufficient to give the total productive capacity for all of the plants of these companies in which the 62.5-cent rate is paid.

Company	ANNUAL TONNAGE CAPACITY		
	Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
American Rolling Mill Co.	514,500	1,807,600	1,106,400
American Steel & Wire Co.	852,700	1,417,000	1,360,500
Carnegie-Illinois Steel Corp.	15,817,000	20,325,900	13,047,900
Inland Steel Co.	1,003,000	2,000,000	1,516,000
Jones & Laughlin Steel Corp.	3,000,000	3,671,200	2,837,600
National Tube Co.	2,179,000	2,400,000	2,284,300
Republic Steel Corp.	2,460,000	5,563,000	3,677,000
Weirton Steel Co.	631,800	1,312,000	955,000
Wheeling Steel Corp.	959,200	1,500,000	974,000
Youngstown Sheet & Tube Co.	3,000,000	3,120,000	2,122,000
Crucible Steel Co. of America	460,000	809,950	691,900
Sharon Steel Corp.	155,000	450,000	305,900
Pittsburgh Steel Co.	480,000	720,000	610,000
Allegheny Steel Co.		482,000	314,200
Otis Steel Co.	430,000	672,000	495,000
Timken Steel & Tube Co.		340,000	236,633
Braeburn Alloy Steel Corp.		5,040	3,000
Firth-Sterling Steel Co.		14,500	9,100
The Fitzsimmons Co. 1/	C	C	C
Latrobe Electric Steel Co.		12,000	5,500
Molybdenum Corp. of America 2/	C	C	C

American Rolling Mill Co.	514,500	1,807,600	1,106,400
American Steel & Wire Co.	852,700	1,417,000	1,360,500
Carnegie-Illinois Steel Corp.	15,817,000	20,325,900	13,047,900
Inland Steel Co.	1,003,000	2,000,000	1,516,000
Jones & Laughlin Steel Corp.	3,000,000	3,671,200	2,837,600
National Tube Co.	2,179,000	2,400,000	2,284,300
Republic Steel Corp.	2,460,000	5,563,000	3,677,000
Weirton Steel Co.	631,800	1,312,000	955,555
Wheeling Steel Corp.	959,200	1,500,000	974,000
Youngstown Sheet & Tube Co.	3,000,000	3,120,000	2,122,000
Crucible Steel Co. of America	460,000	909,950	691,900
Sharon Steel Corp.	155,000	450,000	305,900
Pittsburgh Steel Co.	480,000	720,000	610,000
Allegheny Steel Co.		482,000	514,200
Otis Steel Co.	430,000	672,000	495,000
Timken Steel & Tube Co.		340,000	236,633
Braeburn Alloy Steel Corp.		5,040	3,000
Firth-Sterling Steel Co.		14,500	9,100
The Fitzsimmons Co. 1/	C	C	C
Latrobe Electric Steel Co.		12,000	5,500
Molybdenum Corp. of America 2/	C	C	C
Wilson Steel & Wire Co. 2/	C	C	C
Jessop Steel Co.		16,000	8,500
Rotary Electric Steel Co.		100,000	80,000
Totals	31,943,000	46,938,190	32,839,188

1 32,148 tons cold drawn bars.

133 Plants paying the 62.5-cent base rate are located, at the Western limit, in the Chicago vicinity, and as far East as Worcester, Massachusetts. Eastward from Pittsburgh the 62.5-cent rate is paid in the American Steel and Wire plants in Trenton, New Jersey, New Haven, Connecticut, and Worcester, Massachusetts.

The Steel Workers' Organizing Committee has reported agreements in the plants of the Allegheny Steel Company, American Steel and Wire Company, Braeburn Alloy Steel Corporation, Carnegie-Illinois Steel Corporation, Crucible Steel Company of America, Firth-Sterling Steel Company, Jessop Steel Company, Jones & Laughlin Steel Corporation, Latrobe Electric Steel Company, National Tube Company, Otis Steel Company, Pittsburgh Steel Company, Rotary Electric Steel Company, Sharon Steel Corporation, Timken Steel & Tube Company, and the Wheeling Steel Corporation.

The 63-cent rate is paid in the Detroit vicinity in the plants of the Great Lakes Steel Corporation. This company is a subsidiary of the National Steel Corporation, one of the large enterprises in the industry. The 3 plants of the Great Lakes Steel Corporation are large. The pig iron capacity is 360,200 tons, the ingot capacity 920,000 tons, and the finished hot rolled capacity 950,000 tons.

The 63.5-cent base rate is paid by a small company in Pittsburgh. The Heppenstall Company has an ingot capacity of 46,600 tons.

The Steel Workers' Organizing Committee reports a union agreement at the Heppenstall plant.

The 65-cent base rate is paid in two plants, one in Detroit and the other in San Francisco. The Detroit company is small. The Columbia Steel Company is a subsidiary of the United States Steel Corporation.

The Detroit Seamless Tube plant has a capacity for 25,800 tons of finished hot rolled products. The Columbia Steel plant has capacity to produce 13,280 tons of wire and springs.

The Steel Workers' Organizing Committee reports an agreement at the Columbia Steel plant.

The highest base rate reported for the record is 70 cents an hour; it is paid by the Detroit Steel Corporation in Detroit. This is a small company and the plant is likewise small. Its capacity is 123,000 tons of cold rolled strip.

134 It will aid us in interpreting the minimum wage structure of the industry if we now examine the table on page 75 in the light of the factors which we have just related to the base rates.

Seventeen of the 39 base rates listed in the table fall below 50 cents an hour. 33 of the 234 plants pay the base rates from 30 to 50 cents an hour, and these plants employ 16,049 or 5.1 per cent of all the workers included in the table. In all, 2,787 common laborers are paid base rates below 50 cents and this is approximately 10 per cent of the common laborers included in the table.

Thus, we find that almost half the base rates fall below 50 cents an hour but that only a small portion of the plants and the workers in the industry or the common laborers are affected by these rates. A further indication of the relatively small portion of the industry affected by the rates below 50 cents an hour is shown by a comparison of the capacity to produce of these plants with the total productive capacity of the industry. This comparison is given in the following table:

	Annual Tonnage Capacity		
	Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
Total capacity to produce of plants paying base rates below 50 cents an hour:[1]	3,354,000	2,268,500	2,259,600
Total capacity to produce of iron and steel industry:	52,715,100	71,431,089	54,225,446

[1] One plant has capacity to produce nails only.

The plants paying base rates below 50 cents an hour have 6.4 per cent of the industry's pig iron capacity, 3.2 per cent of the ingot capacity, and 4.1 per cent of the finished hot rolled capacity.

While the portion of the iron and steel industry in which the lower base rates are paid does not loom large in comparison with the remainder of the industry, it does include in its entirety the Southern portion of the industry.

We have considered the South to be the area from the Atlantic Seaboard westward, including Virginia, Tennessee, Arkansas and Oklahoma on the North, and Oklahoma and Texas as the Western limit. This area includes within it the traditional South, with the possible exception of Kentucky. The Kentucky iron and steel plants are allied by

geography and wage structure with the North rather than with the South and, hence, the State has not been included within the Southern area. Oklahoma is a borderline State, standing midway between North and South. The minimum wage in the steel plant in Oklahoma and the geographic position of the plant ally it with the Southern area and we have, as a consequence, included Oklahoma in the South.

If we take out of the table above on page 75 the
135 data which apply to plants located in the South, the following summary applicable to the South is the result:

Base Rate	Number of Plants	Total number of workers in these plants	Total number of employees being paid base rate
34.5	3	653	221
35.3	1	458	125
36.0	1	250	....
36.5	1	2,487	437
40.0	5	1,355	215
43.0	1	175	91
45.0	7	7,631	988
48.2	1	186	38
Totals	20	13,195	2,115

This table shows us that the Southern plants employ most of the workers in plants paying base rates below 50 cents an hour and most of the common laborers paid these rates. The 20 Southern plants employ 13,195 of the 16,049 workers in the plants with base rates below 50 cents and 2,115 of the 2,787 common laborers paid at these rates.

Outside the South, the 30 and 38-cent base rates are paid in small and comparatively isolated pig iron producing plants located in New York and Michigan, respectively. The 42 and 46-cent base rates are paid in two plants in the vicinity of Troy, New York. These plants are both small, having a small capacity for finished hot rolled products.

The other low-rate plants are located in eastern Pennsylvania with the exception of a small plant located in Syracuse, New York and the small nail plant in Massachusetts. The Pennsylvania plants are all in the eastern part of the State. One of the plants paying 46.5 cents is in a non-industrial area but the other is located near Harrisburg. The other plants, paying 48, 48.5, and 49 cents, are located in non-industrial areas. They are all small. One has pig iron capacity only and the others, capacity for finished hot rolled products. All of these low base rate plants in the north are operated by small companies. None produce

steel ingots, their output being either pig iron in small amounts, finished hot rolled products or specialty products, likewise in small amounts.

The situation is different in the South. Large companies in the South pay the lower base rates. The Tennessee Coal, Iron and Railroad Company is a large company in its own right and it is also a subsidiary of the United States Steel Corporation. The Republic Steel Corporation operates two of the low base rate plants. The Sheffield Steel Company, a subsidiary of the American Rolling Mill Company, operates one of these plants. Medium-sized companies operate pig iron plants in the Birmingham area. Small companies likewise operate in the South at the low base rates.

The Southern plants vary from small to large. The Tennessee Coal, Iron and Railroad Company operates
136 large plants in the Birmingham area and the Republic plant at Gadsden is moderately large in size. The Sheffield Steel plant is moderate in size as are the pig iron plants in Birmingham. The other Southern plants may be classified as small.

The Tennessee Coal, Iron and Railroad Company and the Republic Steel Corporation have capacity to produce the principal products of the industry in their Southern plants. The Sheffield Steel Company, The Kilby Steel Company, and The Texas Steel Company also have ingot and finished hot rolled capacity. The other plants are specialized in the production of pig iron or finished hot rolled products.

The union organization to be found in the lower-paying plants as reported by the Steel Workers' Organizing Committee will be found in the South in the Birmingham area.

From the evidence we see that the Southern iron and steel industry is characterized by the presence of large and small companies and large and small plants, and by integrated and non-integrated operations. The characteristic features of the industry as a whole are found in the South with the exception of the characteristic wages of the larger part of the industry. The Southern industry is geared to the lower base rates in contrast to the higher wage plane of the remainder of the industry. Looking at the situation from another direction, the low base rates in the North do not give us a representative cross-section of the industry; the low base-rate plants in the North, as will be seen from further comparison of the higher base rates listed in the

table above, are not typical of the industry in the North. But in the South, whatever the circumstances under which production is carried on, the base rates never rise above the lowest portion of the industry's wage scale.

The wage structure of the industry in the South is very substantially below the remainder of the industry. The highest base rates in the South are much lower than the more predominant lower base rates in the North. Reference to the table above on page 75 will show that there are no concentrations of workers or of those classified as common laborers comparable with the concentration at 45 cents until the rates of 55, 56 and 56.5 cents are reached. The 45-cent rate is paid entirely in the South and is next to the highest Southern base rate. The 55, 56, and 56.5-cent rates are paid in Northern plants and are the lower rates at which the more substantial concentrations appear in the table.

In view of the evidence which shows that across the South for a distance of some 2,000 miles from East to West the minimum wages in the industry are uniformly low, and in contrast to the remainder of the industry, on a much lower plane, we believe that this region should be taken separately for the purpose of finding a prevailing minimum wage.

The Southern region as we have defined its limits here covers a very large territory. Within this territory the degree of industrial development varies and the base rates range from a low rate of 34.5 cents to a high rate of 48.2 cents. The rates vary from State to State, from producing center to producing center, and even within the same producing center. The uniformity that we referred to above is not a uniformity of all base rates in the Southern region but a uniformly low base rate structure in comparison with the remainder of the industry.

137 The Southern iron and steel industry is centralized to a high degree in the State of Alabama. This State alone accounts for 94 per cent of the pig iron capacity of the South, 97.6 per cent of the ingot capacity and 74.7 per cent of the hot rolled products capacity. Birmingham is the center of production in Alabama and for the whole South as well. The table above on page 27 shows that 12 of the reported plants in Alabama are located in the immediate vicinity of Birmingham. Two other plants are located within a radius of 75 miles.

East and West across the long distances in the Southern region from Birmingham the industry has not developed to any extent. Wage data have been summarized above for the plant in Oklahoma and the 3 plants in Virginia. The Rail Steel Bar Association has reported an average base rate for three plants located in Texas, Tennessee and Alabama.

In view of the variation among the base rates and the long distance between the Eastern and Western limits of the region, the question arises as to whether a single prevailing minimum wage should be found for the whole region or whether the Southern region should be divided further into geographic areas and a prevailing minimum wage be found for each area.

At a number of places in the record the Board has been urged to follow the wage districts established by the Code for the Iron and Steel Industry under the National Recovery Administration (R 561, 759, 805, 966, 1093). District 13 was outlined in the Code as all of that part of the United States south of Maryland, West Virginia, Kentucky and Missouri and the States of Texas and Oklahoma, and District 14 was given as Jefferson County, Alabama. The minimum wage in the former District was 25 cents and in the latter 27 cents an hour (Exhibit M, page 24).

One difficulty involved in making application of the Code wage Districts 13 and 14 to the present situation is that they do not outline separate wage areas. The highest base rate in the South is found in the Oklahoma plant and Oklahoma was in District 13, the low wage district. The lowest base rate, if we may judge by an average, is paid in Birmingham which was the higher wage area under the Code. One plant in Virginia pays a rate above some rates paid in Birmingham.

The principal difficulty with the Code wage districts as a means of outlining regional boundaries which might be set up in these proceedings is that the Code districts were not drawn up to bring out the predominant minimum wage practice of the industry viewed either as a whole or over broad geographical regions. The opposite objective motivated the drawing of the boundaries of the Code wage districts (R 759). As it is expressed in the brief of the Andrews Steel Company, under the Code "basic wage rates were established in the steel industry considering local conditions as found in the separate plant locations" (R 1027).

The numerous wage districts in the Code were established to continue many of the wage differentials existing among producing centers at the time the Code was formulated. The purpose underlying the establishment of the Code regions was, therefore, different from the purpose underlying our analysis of the industry's minimum wage structure in the present proceedings. The predominant minimum wage practice in this industry comes to light only when we view the practice of the industry as a whole or over broad regional areas.

138 It does not appear to us that the Southern geographic region which contains the low wage branch of the industry should be broken up into further territorial divisions along the lines followed in the Code or along any other lines. As we have seen, the Southern branch of the industry operates on a substantially lower base rate level compared with the remainder of the industry. The low base rate structure is a distinctive feature of the whole Southern area from Oklahoma to Virginia and including the most important producing area, Alabama. The Virginia companies have specifically urged in the record that because of the similarity of their wage structure with the other Southern plants they be included in the Southern region (R 1100, 1125, 1148). The brief of the E. J. Lavino Company, of Reusens, Virginia, states that: "The wages paid in the State of Virginia are and always have been comparable with similar wages paid throughout the South and in any division the State of Virginia should be included in the Southern District" (R 1151).

The evidence does not show that the Southern region is divided into distinct areas of competition. Rather, the evidence leads in the other direction. Mr. Patton, representing the Republic Steel Corporation, testified at the hearing that the Republic plant at Gadsden is in competition with other plants in Alabama (R. 316) and that the pig iron plant operated by Republic in Birmingham is in competition with the other Birmingham pig iron plants (R 317). Mr. Beye, representing the U. S. Steel Corporation, testified that the Tennessee Coal, Iron and Railroad Company is in competition with the other iron and steel works in Alabama (R 302).

The economic position of the industry in the Southern States other than in Alabama is not specifically covered at

any length in the record but in view of all the evidence with respect to the Southern branch of the industry, we cannot find any factor of separate wage structure or separate economic or geographical position which would warrant the drawing of territorial lines within the Southern region for the purpose of finding more than one prevailing minimum wage.

The table above on page 99 enables us to compare the base rates being paid in the Southern plants and the number of workers involved at each of the base rates. An inspection of the table shows that the outstanding or predominant base rate is 45 cents an hour. Approximately one-half of the common laborers in the South receive 45 cents an hour. This rate is paid in plants which employ over 50 per cent of all the workers employed in the Southern plants. The second largest concentration of workers at any base rate is at the 36.5 rate which is paid to 437 common laborers. The concentrations at the other base rates are much smaller.

It should be pointed out that the 45-cent rate is paid by a single company, The Tennessee Coal, Iron and Railroad Company, with plants in the Birmingham area. As we have seen above, the producing center around Birmingham is far and away the most important part of the Southern industry. Within the Birmingham area the plants of the Tennessee Coal, Iron and Railroad Company have capacity for over three-fourths of the ingot production of the entire South, over one-half of the capacity for finished hot rolled products and almost one-half of the pig iron capacity. And this company employs over one-half of all the workers in the Southern industry. Thus, while it is true that the most predominant base rate is paid by only one company, it is apparent that the relative size and the large working force of this company put it in a position to be the determining factor in establishing the prevailing minimum wage for persons employed in the Southern industry.

139 On the basis of all the evidence in the record with respect to minimum wages in the Southern region, it is clear that 45 cents an hour is the most commonly received minimum wage among persons employed in the Southern branch of the industry, and in view of its pre-

ponderance we find 45 cents to be the prevailing minimum wage in the South.

Although there are no iron and steel plants in Louisiana, Arkansas, Mississippi, North Carolina, South Carolina and Florida, we include these states for the sake of completeness in the Southern region, together with the states in which there are iron and steel plants, namely, Oklahoma, Texas, Alabama, Tennessee, Georgia, and Virginia.

The wage data for the Northern and Western portion of the iron and steel industry are given in the table below. This is the same table as the one above on page 75, but with the data applicable to the South removed.

Base Rates for Common Labor Currently Being Paid in the North and West	No. of Iron and Steel Plants Paying Each of Base Rates	Total No. of Wage Earners Employed by These Plants	Total No. of Common Laborers Receiving Each Base Rate
30.0	1	103	18
38.0	1	342	121
42.0	1	163	9
43.0	1	52	19
46.0	1	300	60
46.5	2	1,008	160
48.0	1	135	24
48.5	3	523	210
49.0	1	165	38
49.5	1	63	13
50.0	7	1,656	233
50.5	1	178	110
51.0	1	335	23
52.0	2	406	77
52.5	1	130	13
53.0	4	2,312	150
54.0	4	2,451	265
55.0	11	6,746	623
56.0	4	2,710	720
56.25	1	162	25
56.5	21	38,947	3,965
57.0	5	4,005	194
58.0	3	1,666	110
58.5	5	11,005	917
59.5	8	9,745	1,128
60.0	13	7,278	438
60.5	1	750	20
62.5[1]	101	200,466	14,669
63.0	3	4,961	277
63.5	1	501	43
65.0	2	283	11
70.0	1	222	64
Totals	213	299,769	24,747

[1] In addition to the companies shown for this rate, the S. W. O. C. reports that it has contracts with the following concerns paying a base rate or common labor of 62.5¢ per hour: Allegheny Steel Co., Brackenridge and West Leechburg, Pa.; Jessop Steel Co., Washington, Pa.; Otis Steel Co., Cleveland; Rotary Electric Steel Co., Detroit; and The Timken Steel & Tube Co., Canton, Gambrinus and Wooster, Ohio.

140 We have already had occasion, above, on page 99, to characterize the base rates in this table below 50 cents an hour. We have seen that this grouping of base rates is paid by companies operating small plants, none of which has capacity to produce ingots. These plants have capacity for small amounts of pig iron or finished hot rolled products. With few exceptions, the plants are located in small communities at some distance from the centers of iron and steel production. These communities are separate from each other. The low base rate plants are found in Michigan, New York and Massachusetts, but the majority are found in the central part of Pennsylvania.

Moving on up the wage scale to the base rate of 55 cents we find that the 50, 50.5, 51, 52, 52.5, 53, and 54 base rates are paid by small companies operating small plants. The only exception is the Central Iron and Steel Company at Harrisburg, Pennsylvania which is a medium-sized company and its operations are medium in size. The Henry Disston Company at Philadelphia is classified here as a small company because its steel operations are small.

None of these companies is integrated to the extent of producing pig iron, ingots, and rolled products, but within this wage grouping a tendency toward integration is noticeable. Six establishments are integrated to the extent of producing both ingots and rolled products. On the whole, the companies and plants paying the 50 to 55-cent base rates are larger than the companies and plants in the lower wage grouping. It will be observed that as the companies and plants increase in size and tend toward integrated operations the base rates are higher.

With regard to location the plants in this wage grouping exhibit a different tendency from the group of plants paying the base rates below 50 cents. The plants in the higher wage group tend to be located in the immediate vicinity of the larger producing centers, and the plants located outside a steel-producing center are generally situated in larger communities that was the case with the plants in the lower wage grouping. No particular locale marks out the location of the plants paying the base rates from 50 to 55 cents. These rates are found in localities eastward from Marion, Ohio into New England. Geographically, the lower paying plants are, for the most part, tied into the economy of

producing areas in which higher rates are paid. Only two small producing centers come entirely within the grouping of base rates below 55 cents.

Northeast from Pittsburgh, at Erie, Pennsylvania, a distance of approximately 100 miles, the two plants pay the base rate of 53 cents. Each of the plants has a small capacity for ingots and finished hot rolled products, and both are operated by small companies. The Erie Forge Company employs 241 workers of whom 3 are paid the base rate and the Erie Forge and Steel Company employs 625 of whom 9 are paid the base rate.

141 Outside the South the producing center paying the lowest base rates is the small center in the vicinity of Troy, New York. The companies and plants here are small. The situation with respect to base rates is as follows:

Name	No. of employees	No. on base rate	Base Rate (cents)
Cohoes Rolling Mill Co.	163	9	42.0
Burden Iron Co.	300	60	46.0
Troy Furnace Co.	196	37	50.0
Rail Joint Co.	132	24	52.0

Neither Erie nor Troy can be said to be distinct economic regions. Both centers are relatively short distances from other centers of production.

In our consideration of the base rate scale we have yet to deal with the bulk of the industry. The base rates from 30 to 55 cents are over half the base rates paid in the Northern and Western industry. But the number of plants, and employees, and the capacity to produce included within this wide range of rates is only fractional compared with the extent of the industry paying the higher rates. Thirty-three of the 213 plants pay the base rates below 55 cents. These plants employ 10,322 of the 299,769 workers, or 3.4 per cent, and 1,543 of the 24,747 common laborers or 6.2 per cent. In terms of capacity to produce compared with the industry as a whole these plants have 6.9 per cent of the pig iron capacity, 4.0 per cent of the ingot capacity and 5.7 per cent of the finished hot rolled products capacity.

With the base rate of 55 cents we come to the portion of the base rate scale within which is included the larger phase of iron and steel production. The following table (See

page 106) summarizes the wage data and the capacity figures for the plants paying each of the base rates above 54 cents.

Although 15 base rates are listed in the above table, (See p. 106) a number of them are of minor importance. In fact, the principal operations of the industry may be said to be carried on in plants paying only 5 different base rates, namely, 56.5, 58.5, 59.5, 60, and 62.5 cents. Over 90 per cent of the workers and plant capacity represented in the table are accounted for by the companies which pay the 5 base rates just enumerated. As we have observed before, one of these rates, 62.5 cents, stands out above the others to an overwhelming degree. This rate alone accounts for over two-thirds of the total number employed in the plants paying base rates above 54 cents, for approximately 60 per cent of the common laborers, and for over two-thirds of the capacity of these plants. The base rate of 56.5 cents takes second place in importance but much below 62.5 cents, with approximately 13 per cent of the workers and 11 per cent of the ingot capacity of the plants in the table. The three rates, 59.5, 58.5, and 60 cents, in order of their importance fall much below the two other outstanding rates.

106.

Base Rate (cents)	No. of Plants Paying Each Rate	Total No. of Employees in These Plants	Total No. of Common Laborers Paid Each Base Rate	TOTAL PRODUCTIVE CAPACITY (TONS) OF PLANTS PAYING EACH BASE RATE		
				Pig Iron and Ferro Alloys	Steel Ingots and Steel for Castings	Finished Hot Rolled Products
55.0	11	6,746	83	0	843,300	872,750
56.0	4	2,710	20	0	360,000	178,000
56.25	1	162	25	90,000	0	0
56.5	21	38,947	3,65	3,959,280	7,036,800	4,845,695
57.0	5	4,005	34	0	690,200	345,400
58.0	3	1,666	10	0	256,500	192,000
58.5	5	11,005	17	1,332,000	2,070,000	1,513,900
59.5	8	9,745	1,28	2,777,100	2,936,000	2,217,800
60.0	13	7,278	58	655,000	1,262,000	1,035,400
60.5	1	750	20	0	0	50,000
62.5	101	200,466	14,69	31,943,000	46,938,190	32,839,183
63.0	3	4,961	77	360,200	920,000	950,000
63.5	1	501	43	0	0	46,600
65.0	2	283	11	0	0	25,800
70.0	1	222	64	0	0	0
Totals	180	289,447	23,04	41,116,580	63,312,990	45,112,528

The underlying reason for these pronounced uni-
143 formities and concentrations in the scale of base rates is the large integrated operations of the large companies, all of which fall within the portion of the scale above 54 cents and most of which are carried on at the 5 rates just mentioned. Some of the large companies control small or medium-sized subsidiaries or operate small plants directly, but one of the main determinants of the base rate structure is the large integrated operations of the large companies. The uniformity and the concentrations which we have just pointed out at the few base rates are the direct result of the employment of large numbers of workers in the industry's large operations.

The details as to size of company and plant, and also as to the nature of product, extent of unionization, and geographic location as they are related to the base rates of 55 cents and more have been presented above on pages 79 to 84 and 89 to 98. We will summarize some of the salient details here, first, as to the position of the large companies.

Large scale operations come into the picture with the 56.5-cent base rate. Below this rate are a moderate-sized subsidiary of a large company and three small plants operated by large companies. At the 56.5-cent rate a single large company, Bethlehem Steel, is predominant to the extent of employing over 74 per cent of all the workers in the plants paying this rate and over 64 per cent of the common laborers. The influence of the large company and the large integrated operations on the base rate structure is illustrated by the fact that in the Bethlehem plant at Sparrows Point, Maryland, 15,846 workers are employed of whom 1,477 are paid the base rate, and at the plant in Bethlehem, Pennsylvania there are employed 8,342 workers of whom 391 are common laborers being paid the base rate. Although 21 plants are listed at 56.5 cents, these 2 plants alone account for over one-half the workers employed and for approximately one-half the common laborers paid the base rate. Only one other large company pays the base rate of 56.5 cents and this is the American Steel and Wire Company in its small plant at Allentown, Pennsylvania.

With the 58-cent rate the Western plants begin to come into the picture. A subsidiary of the U. S. Steel Corporation and the Bethlehem Steel Company carry on relatively small operations at this rate.

Johnstown, Pennsylvania is the most important producing center in which the rate of 58.5 cents is paid and this is due to the extremely large integrated plant situated there and operated by the Bethlehem Steel Company. This plant employs 7,649 workers of whom 515 receive the base rate. The total number of workers employed in plants paying the 58.5-cent base rate is 11,005 and the total number of common laborers paid the base rate is 917. The outstanding position of the Bethlehem plant is apparent from this comparison. The Carnegie-Illinois Company also operates a plant in Johnstown and pays the 58.5-cent rate but this plant is much smaller than the Bethlehem plant, and the plants at Cambridge, Ohio are very small.

At the 59.5-cent rate the Bethlehem Steel Company is also in a predominant position. The Lackawanna plant, paying the 59.5-cent rate, is one of the largest plants in the industry. In all, this plant employs 6,853 workers of whom 603 are paid the base rate. The other plants in which the 59.5-cent rate is paid employ a total of 2,891 workers of whom 526 are paid the base rate. This comparison shows the predominance of the large integrated Bethlehem plant at the 59.5-cent rate. Much smaller, but second in size to the Lackawanna plant, is the Republic plant located in the same vicinity. Also operating in this vicinity and paying this rate is the Hanna Furnace Company, a subsidiary of a large company. Two other large companies, Carnegie-Illinois and Inland, pay the 59.5-cent base rate in small plants located in the Middle West.

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The American Steel and Wire Company; Carnegie-Illinois; the Columbia Steel Company, a subsidiary of the U. S. Steel Corporation; and the Bethlehem Steel Company carry on operations at the 60-cent rate but none of them is of outstanding size. This rate represents the smaller operations of the U. S. Steel Corporation and Bethlehem Steel on the West Coast and principally the American Steel and Wire plants in the Middle West which are not large.

The list of companies which have plants paying the 62.5-cent rate includes every large company reported in our survey with the exception of the Bethlehem Steel Company. Moreover, the operations of these large companies are very largely carried on in plants paying this base rate. The United States Steel Corporation subsidiaries carry on much

the largest portion of their operations at the 62.5-cent rate. The same thing may be said of the Republic Steel Corporation, the Inland Steel Company, and the American Rolling Mill Company. The entire operations of the following large companies are carried on in plants paying the 62.5-cent rate: Jones and Laughlin Steel Corporation, Weirton Steel Company, Wheeling Steel Corporation, and Youngstown Sheet and Tube Company.

We have already noted above on page 96 the total capacity of the large companies in the plants paying the 62.5-cent rate, and a summary of the wage data applicable to this rate will be found on pages 81 to 83. The following comparison of the ingot capacity of the large companies together with the wage data for each company will show both the enormous scale of operations carried on at the 62.5-cent rate and the relative size of the various large companies operating at this rate.

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Name of Large Company	Ingot Capacity of large company operations at 62.5 cent base rate.	Total number of workers employed by large companies in operations at 62.5-cent base rate.	Number of common laborers employed by large companies paid 62.5-cent base rate.
U. S. Steel Corp.:			
Carnegie-Illinois Steel Corp.	20,325,900	67,768	5,124
National Tube Co.	2,400,000	13,283	18
American Steel & Wire Co.	1,417,000	11,550	354
Republic Steel Corp.	5,563,000	19,316	1,071
Jones & Laughlin Steel Corp.	3,671,200	16,090	1,886
Youngstown Sheet & Tube Co.	3,120,000	14,938	670
Inland Steel Co.	2,000,000	9,726	304
American Rolling Mill Co.	1,807,600	8,809	337
Wheeling Steel Corp.	1,500,000	16,859	2,217
Weirton Steel Co.	1,312,000	9,095	1,322
Totals	43,116,700	187,434	13,303

This table brings out the huge extent of operations which may be said to be characteristic of the industry when it is viewed in the light of employment and capacity to produce. If we were to add to this picture the large operations of Bethlehem Steel we would have accounted for the largest

part of the iron and steel industry by far. We should like to emphasize the factor of the large integrated operations in the industry because, as we have just said, this factor is the determining influence making for uniformity among the base rates and the concentrations of workers at a small number of rates.

It has been seen that the Bethlehem Steel Company occupies an outstanding position at the 56.5, 58.5 and 59.5 cent rates by virtue of a few extremely large operations. Among the large companies at the 62.5-cent rate, the Carnegie-Illinois Steel Corporation takes a commanding lead over the others judged by capacity and employment. And the United States Steel Corporation, including in addition to Carnegie-Illinois, the American Steel and Wire Company and the National Tube Company, overshadows the other large companies.

As was the case with Bethlehem, the Carnegie-Illinois Corporation operates several establishments of enormous size, the largest of which are at South Chicago, Illinois and Gary, Indiana, where the total ingot capacity is ap-
146 proximately 10,000,000 tons, and the employment 29,161 of which 3,133 is common labor paid the base rate. Carnegie-Illinois also carries on extremely large operations at Youngstown, Ohio, and in the Pittsburgh vicinity at Bessemer, Duquesne, and Munhall.

We will not attempt to set forth here an account of the extensive operations of the United States Steel Corporation, or of other large companies. These facts as to size of operations have been mentioned for the purpose of emphasizing the large operations of the industry at the few outstanding base rates in the wage tables above. But before leaving this point it should be observed that while among the large companies at the 62.5-cent base rate, the United States Steel Corporation takes the commanding lead, the other companies also engage in operations of enormous size. For instance, the operations of the Inland Steel Company at Indiana Harbor, Indiana; the Youngstown Sheet and Tube Company at Campbell, Ohio; the Republic Steel Corporation at Cleveland and Youngstown, Ohio; and the Jones and Laughlin Steel Corporation at Aliquippa and Pittsburgh, Pennsylvania.

Above the 62.5-cent rate the operations of large companies are carried on through subsidiaries in the two in-

stances where there are such operations. The Great Lakes Steel Corporation at Detroit paying the 63-cent rate is a subsidiary of the National Steel Corporation, and the Columbia Steel Company in California paying 65 cents is a subsidiary of the United States Steel Corporation.

We will not attempt to examine in any detail the position of the small and medium-sized company in the base rate structure above 54 cents an hour since it is obvious from the discussion of large companies that the small and medium-sized companies play only a minor role in shaping the outstanding concentration of workers at these higher base rates. The influence of these companies on the wage structure may be appraised from the following table which shows at each of the base rates above 54 cents the percentage of total workers and the percentage of common laborers employed in small and medium-sized companies.

Base Rate	Percentage of total workers employed in small and medium-sized companies at each base rate.		Percentage of common laborers employed in small and medium-sized companies at each of the base rates.	
	Small companies	Medium-sized companies	Small companies	Medium-sized companies
55.0	21.2	46.8	27.3	28.1
56.0	0	92.3	0	94.4
56.25	100.0	0	100.0	0
56.5	6.9	16.9	7.1	27.4
57.0	78.1	21.9	65.9	34.2
58.0	10.3	0	16.4	0
58.5	0	19.0	0	32.4
59.5	5.3	0	6.6	0
60.0	14.4	0	22.4	0
60.5	100.0	0	100.0	0
62.5	0.9	5.6	1.3	8.0
63.0	0	0	0	0
63.5	100.0	0	100.0	0
65.0	68.2	0	72.7	0
70.0	100.0	0	100.0	0

The medium-sized companies make a fairly important contribution to the operations which are carried on at the 55, 56, 56.5, 57, and 58.5 cent rates. The small companies are important at 55, 57, 60, and 65 cents. At the 56.25, 60.5, 63.5 rates and 70 cents the small companies account for the entire output. It cannot be said that the small and medium-sized companies are a negligible factor in the industry at the higher rates but in the aggregate these companies contribute little to the large operations of the industry.

The comparison of the wage areas above and below 55 cents shows that the small non-integrated company is the characteristic producing unit within the base rate scale below 55 cents and that above this rate the industry is characterized by large integrated companies operating as a rule on an exceedingly large scale. We have seen that only a few base rates in the wage scale are of primary or outstanding importance in terms of workers employed at them or of the capacity of the plants in which they are paid.

Collective bargaining makes its appearance as an applicable factor in connection with the base rate structure at the rate of 55 cents. At the lower rates the American Car and Foundry Company reported that its 48-cent base rate was the result of collective bargaining. The lowest base rate in a company reported by the Steel Workers' Organizing Committee to be under an agreement with it is the 50-cent rate paid by Henry Disston and Sons. The only other company paying below 55 cents an hour reported by the Steel Workers Organizing Committee to be under an agreement with it is the Eastern Rolling Mill Company which pays a base rate of 53 cents.

At the 55-cent rate agreements are reported by the Steel Workers' Organizing Committee for a medium-sized company and one of the companies has reported a union agreement also.

Above 55 cents union agreements are reported by the Steel Workers' Organizing Committee with one large and one medium-sized company operating plants at the 56-cent base rate, and at 56.5 cents with one large company in a small plant, and with three medium-sized companies. In addition a small company paying the 56.5-cent rate reports a union agreement.

148 At 57 cents the Steel Workers Organizing Committee reports an agreement with a small company at 58 cents with the West Coast subsidiary of the United States Steel Corporation, and at 58.5 cents with the Carnegie-Illinois Steel Corporation. One of the companies paying the 58.5-cent rate has reported a union agreement. A small plant operated by Carnegie-Illinois is the only plant covered by a union agreement at the 59.5-cent rate. At 60 cents agreements have been reported for the subsidiaries of the United States Steel Corporation.

The largest development of collective bargaining is found at the rate of 62.5 cents. The steel Workers' Organizing Committee reports agreements covering the operations of the United States Steel Corporation, Jones and Laughlin Steel Corporation, and the Wheeling Steel Corporation among the large companies and several agreements among the medium-sized and small companies at the 62.5-cent rate.

Above 62.5 cents agreements are reported for a small company paying the 63.5-cent rate and for a subsidiary of the United States Steel Corporation operating a small plant at the 65-cent rate.

Turning now to the subject of geographical location we refer back to the table on pages 79 and 84 for a detailed listing by location of the plants in which the base rates above 54 cents are paid. It will be found that the base rates are paid in the following locations:

55.0—New England; near Buffalo; central Ohio and Indiana; Kansas City and St. Louis, Missouri.

56.0—Kentucky; West Virginia; Philadelphia; western Illinois.

56.25—Central Ohio.

56.5—Sparrows Point, Maryland; Philadelphia vicinity; eastern and central Pennsylvania; northern New Jersey; Syracuse, New York; central Ohio; St. Louis vicinity.

57.0—Philadelphia and vicinity; eastern Pennsylvania; northern New Jersey; New England.

58.0—California; New England.

58.5—Johnstown, Pennsylvania; central Ohio; St. Louis vicinity.

59.5—Buffalo and vicinity; Philadelphia; central Indiana; Chicago vicinity.

60.0—Pittsburgh vicinity; Buffalo vicinity; Duluth, Minnesota; central Indiana; Chicago vicinity; Colorado[1]; Utah; California; Washington.

60.5—Central Ohio.

62.5—Chicago and vicinity; Gary and vicinity; Michigan; central Ohio; Kentucky; Cleveland and vicinity; Youngstown and vicinity; Pittsburgh and vicinity; West Virginia; New Jersey; New England.

[1] 60 cents estimated to be base rate from data contained in the Bureau of Labor Statistics survey.

149 63.0—Michigan.
63.5—Pittsburgh.
65.0—California; Michigan.
70.0—Michigan.

It will be observed that none of the rates is paid exclusively in any one geographic area except in the few instances where there is only a single plant paying one of the rates. The summary of plant location in connection with the base rates shows that each of the outstanding base rates is paid by plants spread across the Middle West and the East. For instance, 56.5, 58.5, 59.5, and 62.5 cents are paid in plants located in the Middle West and east of Pittsburgh. The Western plants are represented in the scale by the base rates of 58, 60, and 65 cents. These rates are also paid in the Middle West and east of Pittsburgh.

While it is apparent that no portion of the wage scale can be assigned exclusively to New England, or east of Pittsburgh, or the Middle West or the West, it is a fact that in a good many localities and areas over the breadth of the country one or another of the base rates is paid to more workers than is any of the other rates. The industry is spread between the four corners of the country. The geographic limits of the industry are as wide apart as Portland, Maine; Seattle, Washington; Duluth, Minnesota; and Fort Worth, Texas. There are plants in 30 states and every section of the country has a share in the production of iron and steel and their products. In some parts of the country the plants are sparsely distributed and in other places they are thickly concentrated around a center of production. The plants are located in or around the large and middle-sized cities, in small communities, and even in rural areas. It is to be expected that differences in location would be reflected in different base rates. This feature of the base rate structure has been the basis upon which a number of requests have been made for findings of prevailing minimum wages applicable to particular geographic areas.

It has been proposed that the Western States should be grouped together and a separate prevailing minimum wage be found for this geographic region (R 67). A prevailing minimum wage has been found for the South. The base rates in the Southern plants are consistently so far below

the base rate structure of the remainder of the country that it is safe to say that they reflect a combination of wage-making factors that are characteristic of the South but not of the remainder of the country. The Southern region which contains these low-paying plants is one of the broad geographic divisions that is customarily made when the country is divided on a regional basis. The West is also such a region.

The boundaries of a Western region in the iron and steel industry might be drawn down the West Coast from Seattle to Los Angeles, a distance of approximately a thousand miles, and inland to Colorado, the distance of another thousand miles. This region would contain the Western development of the iron and steel industry. But unlike the situation in the South the base rate structure in the West is on the same plane as the rate structure of the Eastern plants. Two companies in Los Angeles pay the 58-cent base rate. The plants are small but one of the operating companies is the Bethlehem Steel Company and the other is a subsidiary of the United States Steel Corporation. Reports have been received in the record for 4 plants paying the 60-cent base rate and there is evidence in the record that this is the rate paid by the Colorado Fuel and Iron Company. This company is medium-sized and with it as an exception the other Western plants are small. However, they are operated by the Bethlehem Steel Company and by a subsidiary of the United States Steel Corporation. Two of the 60-cent plants are located in the San Francisco vicinity, one in Seattle, and one in Utah. The base rate of 65 cents is paid in a small San Francisco plant operated by the Western subsidiary of the United States Steel Corporation.

The West is a separate geographic region but the base rates paid in the Western industry are not distinctly on a plane above or below the range of base rates which we have seen to be characteristic of the major operations of the industry outside the South. The 58, 60, and 65-cent rates come within the range from 55 to 70 cents. The 60-cent rate which is outstanding in the Western industry is also a familiar rate in the Middle West. The conformity of the Western base rates with the characteristic rate structure of the greater part of the industry leads us to the

conclusion that the West should not be taken separately as a geographic region for the purpose of finding a prevailing minimum wage.

It has been urged that each of the wage districts established under the code for the Iron and Steel Industry be taken as an area for finding a separate prevailing minimum wage. The applicability of the Code wage districts to the present proceedings has been discussed above at page 101 in connection with the prevailing minimum wage in the South. What was said there as to the difference between the purpose of the geographic wage districts under the Code and the purpose of the present proceedings is also pertinent here. Moreover, there have been a number of shifts in the relationships between the minimum wages of the wage districts since the expiration of the Code. Minimum wages have apparently moved upward in the Code districts described as the Canton, Massillon and Mansfield District, and in the South Ohio River District with the effect of removing the differentials that were established under the code between these and other districts in the same general area. Nor in view of the substantial uniformity among the base rates at the present time in the following Code districts would there seem to be any reason for a differential: The Colorado District, the Utah District, the Seattle District, and the San Francisco District.

Whether the wage districts of the Code be followed or some other system of geographic districting be adopted, it will be found that between a number of adjacent centers of production there are variations existing in the range of base rates and variations in the base rates that predominate. For instance in the St. Louis area base rates paid are 55, 56.5 and 58.5 cents. In view of the absence of an outstanding concentration of workers, it would be difficult to indicate the predominant base rate here, but on the whole, the base rates are lower than they are in the Chicago and Gary vicinity and also in the ring of small producing centers around Chicago and Gary, including central Indiana. In this ring of producing centers the base rates vary from a low of 55 to a high of 60 cents with a tendency toward the latter as the predominant rate. In and around Chicago and Gary the rates vary from 59.5 to 62.5, the latter being the predominant rate.

151 In the vicinity of Detroit the base rates are the highest in the country starting at 62.5 and going to 70 cents. A preponderance of the workers receive the 63-cent rate. Down through central Ohio there are a number of small producing centers where the base rates are on the whole lower than in surrounding territory. The rates in these centers are as low as 51 cents and as high as 58.5 cents with some tendency shown toward 56.5 cents. In one plant in northern Kentucky the rate of 56 cents is lower than the 62.5-cent rate in adjoining producing centers. Such centers as Cleveland, Youngstown, Pittsburgh, and Wheeling pay the 62.5-cent rate with few exceptions. The low base rates in Erie, Pennsylvania have been noted above on page 104 in connection with the discussion of base rates below 55 cents an hour.

A short distance east of Pittsburgh at Johnstown the base rate is 58.5 cents. In and around Buffalo the rates vary from a low of 50.5 cents to a high of 60 cents. A preponderant number of workers receive the 59.5-cent rate. At Harrisburg and in the immediate vicinity the base rates of 54 and 56.5 cents are paid. The latter rate predominates. To the North and Northeast of Harrisburg within a radius of 100 miles are a number of small producing centers. The base rates of these plants vary from a low of 46.5 to a high of 56.5. Three of the eight plants pay the 56.5-cent base rate and although this rate is paid to more workers than any of the other rates, it is not outstanding to any degree.

Eastward from Harrisburg within a distance of 100 miles is the important producing area in the vicinity of Bethlehem. Here the base rates are 56.5 and 57 cents with the former predominating. Southeast from Harrisburg, approximately 150 miles, is Baltimore and Sparrows Point where the base rates are 53, 54, and 56.5 cents with the latter taking the outstanding lead.

In the Philadelphia vicinity the variation in base rates is from 43 to 59.5 cents. The 56.5-cent rate predominates here. Likewise in New Jersey, although the rates range from a low of 50 cents to a high of 62.5 cents, the predominating rate is 56.5 cents.

In and around Syracuse the rates are 48.5 and 56.5 cents with the latter predominating. We have already, on page 104, had occasion to mention the low base rate area in the

vicinity of Troy, New York, the lowest wage area outside the South. The rates vary from 42 to 52 cents and it would be difficult to call any one of the rates here predominant.

The base rates in New England vary from a low of 49.5 cents to a high of 62.5 cents. The following rates are paid, 49.5, 50, 52.5, 55, 57, 58, and 62.5. In view of the distribution of workers at the various rates, it would likewise be difficult to call any one of these rates predominant, although the 55 and the 62.5-cent rates stand out about equally in the table.

These various producing centers occupy relatively small areas and none of them can be called geographic regions. It should be noted that the variations in base rates between a majority of the producing centers are not wide. The limits of the principal variations are 56.5 and 62.5 cents. It should also be noted that in most instances the variations in base rates between the producing centers are less than the variations in base rates within a single area. The question here is whether these relatively small wage variations between relatively small geographical areas should be made the basis for separate findings of prevailing minimum wages which would be limited to the locale of the variation.

152 If it were a situation in which the markets of the iron and steel industry were restricted within narrow limits to the sources of production, the varying wage rates might well be a reflection of strictly local or isolated wage structures, each one of which should be separately treated, despite the relatively small differences between the base rates. Actually, the main channels of trade in the industry take their course far beyond the confines of local producing areas. The system of delivered prices which has until recently, at any rate, determined the prices charged by the iron and steel producers for their goods is built on a series of basing points and it is the distance of the customer from these basing points that has determined the extent of the market and not, as a rule, the distance of the producer from the customer. Hence, we find it next to impossible to use the conventional measurement of miles on the map to outlines the marketing areas of the iron and steel producers. It is safe to say that the enormous expense required to build an iron and steel plant and the

large overhead required to run one call for a correspondingly large area of customers.

There are numerous statements in the record from the iron and steel manufacturers with respect to the extent of their markets and the nature of their competition.

The briefs of the Bethlehem Steel Company describe the industry as being "nation-wide in extent" (R 1249), and with reference to its own position in the industry that "the various iron and steel products that are produced at the various plants of the company are sold by it throughout the United States and in foreign countries in competition with similar products that are produced at plants of other companies located in various parts of the United States, including plants located in the South and on the Pacific Coast" (R 1215).

In a brief submitted on behalf of several small companies the following statement is made: "The market for iron and steel products is countrywide and the Eastern plant is at the end of the line and must ship materials to the West and South at prices which, including the freight, must be at equality with the competition and the market" (R 1187).

The Rustless Iron and Steel Corporation located at Baltimore states that:

"Some of the Corporation's principal competitors are located in the Pittsburgh area. In the first six months of 1938, 58% of Rustless Iron and Steel Corporation shipments were made to destinations in or west of the Pittsburgh district, and during the same period, 91% of its purchases of stainless steel scrap, an essential raw material, were received from points in or west of the Pittsburgh area." (R 1112-1113).

The South Chester Tube Company, located at Chester, Pennsylvania, makes the following statement with respect to its competition:

"The products manufactured by the Company are in demand largely in the oil and gas fields of this and foreign countries. The major portion of the Company's output is sold in Texas, California, Oklahoma, Louisiana, Kansas, New Mexico and West Virginia. The Company is in constant competition at all points with Pittsburgh mills manufacturing similar products." (R 1353)

153 Mr. Wear testified for the Harrisburg Steel Corporation at Harrisburg, Pennsylvania, that his company did not compete with the Central Iron and Steel Company, also in Harrisburg, nor with the Bethlehem plant at Steelton in the neighborhood, but that his company competed with Bethlehem on products manufactured by Bethlehem at other locations (R 335). Specifically, Mr. Wear testified that as to competition with other companies "We are competing with the National Tube Company, the United States Steel Corporation, and we compete with Youngstown Sheet and Tube, Jones and Laughlin, Pittsburgh Steel, Pittsburgh Pipe, and several other smaller companies" (R 335).

Mr. Parker for the Carpenter Steel Company stated that the competition of the plant at Reading, Pennsylvania is with Midvale and Disston in Philadelphia; Bethlehem at Bethlehem, Pennsylvania; The Crucible plants at Jersey City and Harrison, New Jersey, and Syracuse, New York; the Ludlum Steel Company at Dunkirk and Watervliet; and "several smaller companies in the Pittsburgh district, such as Vulcan, Braeburn, and Firth-Sterling, for instance" (R 361). With respect to the plant at Kenilworth, New Jersey, Mr. Parker stated that the principal competitor was the Republic Steel Corporation at Cleveland, Ohio (R 361).

Mr. Welch for the Youngstown Sheet and Tube Company stated that his company was in general competition with other steel plants (R 448).

Mr. Harding for the Crucible Steel Company of America testified as follows:

"We are in competition with almost everybody some way or other. We are in competition with Bethlehem, the United States Steel, Ludlum Company, and I could go on and name a great many, depending upon the particular specialty". (R 473).

For the Republic Steel Corporation Mr. Patton testified that the plant at Buffalo is generally in competition with other establishments (R 320). With reference to the Carnegie-Illinois plant at Johnstown, Mr. Beye stated that the products of this plant were sold in the Middle West and East (R 311).

The Continental Steel Corporation in central Indiana maintains that "being located where there is no considerable market for our finished product we must absorb extensive freight losses to supply distant customers who have been acquired and served over a period of many years." (R 1090).

In a letter from the Laclede Steel Company, located in Madison, Illinois, it is stated that: "This district (St. Louis) is between Birmingham and Chicago and must compete with both for business in our own territory." (R 774). The Sheffield Steel Corporation, with plants at Kansas City and St. Louis, Missouri, states that: "In addition to our competition with the higher mechanized Northern and Eastern mills, we are forced to compete in the Southwest, where we operate, with Southern mills which are much more highly mechanized than our mills and have a still lower minimum common labor rate of approximately 45 cents per hour." (R 566). The Granite City Steel Company in southern Illinois gives as its competitors plants in Chicago, Pittsburgh and Birmingham (R 704).

154 Mr. Boal for the Andrews Steel Company at Newport, Kentucky stated that north of the Ohio River "we are in competition with all the mills that make sheets" (R 400), and "we do not ship into the Pittsburgh district, but in Detroit, Cleveland, Chicago" (R 400). South of the Ohio River Mr. Boal stated that the principal competitors of his company are "The Tennessee Coal and Iron and the Gulf States Company. But the Tennessee is our principal competitor, of course. Some of the Eastern mills go down in there. But they are our principal competitors in the South. That is on one quality of material, known as roofing, and that is practically all we sell in the South" (R 401). Mr. Boal also stated that his plant competed with the American Rolling Mill Company in Northern territory (R 403).

Thus, the record gives us an insight into one of the outstanding features of the iron and steel industry, the widespread sweep of the market for its products. The producing areas are not also the consuming areas and the products move Westward from the East and into the East from the Middle West. From the north the products move into the South and to some extent the South sends products North (R 185).

With respect to these proceedings, the widespread operations of the iron and steel companies are brought out in striking fashion by the evidence in the record as to the bidders on government contracts for iron and steel products.

Subject to the provisions of the Public Contracts Act, the Colorado Fuel and Iron Company in Colorado and the E. J. Lavino Company in Virginia have been awarded large contracts for ferro-manganese (Exhibit E, R 29). Contracts for steel and rolling mill products, to mention only a few among many successful bidders, have gone to the Tennessee Coal, Iron and Railroad Company at Ensley, Alabama; the Kilby Car and Foundry Company at Anniston, Alabama, the Truscon Steel Company for manufacture at the Republic plant in Gadsden, Alabama; the Bethlehem Steel Company at Sparrows Point, Maryland; Steelton, Pennsylvania; Seattle, Washington; San Francisco, California; Bethlehem, Pennsylvania; Lackawanna, New York; and Johnstown, Pennsylvania; the Jessop Steel Company at Washington, Pennsylvania; the Erie Forge Company at Erie, Pennsylvania; the Eastern Rolling Mill Company at Baltimore, Maryland; the Sheffield Steel Corporation at Kansas City, Missouri; the Midvale Company at Nicetown, Pennsylvania; the Carnegie-Illinois Steel Corporation at McKeesport, Pennsylvania; Johnstown, Pennsylvania; Gary, Indiana; Pittsburgh, Pennsylvania; Duquesne, Pennsylvania; Duluth, Minnesota; Chicago, Illinois; the Lukens Steel Company at Coatesville, Pennsylvania; Jones and Laughlin Steel Company at Pittsburgh, Pennsylvania; the Youngstown Sheet and Tube Company at Youngstown, Ohio; the Republic Steel Corporation at Massillon, Ohio; Buffalo, New York; and Chicago, Illinois; the Crucible Steel Company of America at Jersey City, New Jersey; the Weirton Steel Company at Weirton, West Virginia; Henry Disston and Sons at Philadelphia; Judson Steel Corporation at Oakland, California; the Phoenix Iron Company at Phoenixville, Pennsylvania; Inland Steel Company at Indiana Harbor, Indiana. Many other successful bidders could be listed here but the names and locations of the companies above are sufficient to show that the Government requirements for iron and steel are served by plants located in all parts of the country.

The economic inter-relationships among the plants situated in various parts of the country are brought out by the evidence in the record with respect to the names and locations of companies which have bid against each other for the same Government contract (R 878-892). It will
155 be sufficient if we give a few examples of these bidders to illustrate the point that geographic location does not limit the efforts of iron and steel manufacturers to secure Government business. In the following table is given the contracting agency, the contract number, the date of the contract, the amount and the product for a number of contracts, together with the list of bidders on each contract:

Agency	Contract No.	Date	Amount (dollars)	Product	Bidders
Navy Dept.	51349	Nov. 3, 1936	18,170	Steel	Union Drawn Steel Co., Massillon, Ohio Bethlehem Steel Co., A. M. Casle (agent) Wycoff Drawn Steel Co., Pittsburgh Bliss & Laughlin, Inc., Harvey, Ill.
Navy Dept.	51392	Nov. 5, 1936	12,482	Steel	Jessop Steel Co., Washington, Pa. Allegheny Steel Co., Brackenridge, Pa. Carnegie-Illinois Steel Corp. Eastern Rolling Mill Co., Baltimore Crucible Steel Co. of America Latrobe Electric Steel Co., Latrobe, Pa. Ludlum Steel Co., Watervliet, N. Y. Republic Steel Corp., Cleveland, Ohio
Navy Dept.	51551	Nov. 14, 1936	59,542	Plates	Erie Forge Co., Erie, Pa. Allegheny Steel Co., Brackenridge, Pa. Bethlehem Steel Co.
Navy Dept.	52343	Jan. 11, 1937	26,814	Steel	Eastern Rolling Mill Co., Baltimore Allegheny Steel Co., Brackenridge, Pa. Carnegie-Illinois Steel Corp. Crucible Steel Co. of America Jessop Steel Co., Washington, Pa.
Navy Dept.	52277	Jan. 14, 1937	11,137	Conduit	Cohoes Rolling Mill Co., Cohoes, N. Y. American Car & Foundry Co., Berwick, Pa. Youngstown Sheet & Tube Co.
Navy Dept.	56979	Sept. 29, 1937	138,626	Plates, etc.	Lukens Steel Co., Coatsville, Pa. Bethlehem Steel Co. Carnegie-Illinois Steel Corp. Central Iron & Steel Co., Harrisburg, Pa. Granite City Steel Co., Granite City, Ill. Jones & Laughlin Steel Co., Pittsburgh Alan Wood Steel Co., Conshohocken, Pa. Worth Steel Co., Claymont, Del.

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(continued)

Navy Dept.	58129	Dec. 15, 1937	447,200	Steel Plates	Central Iron & Steel Co., Harrisburg, Pa. Bethlehem Steel Co. Carnegie-Illinois Steel Corp. Inland Steel Co., Chicago Lukens Steel Co., Coatesville, Pa. Jones & Laughlin Steel Corp., Pittsburgh Jas. T. Ryerson, Chicago Alan Wood Steel Co., Conshohocken, Pa. Worth Steel Co., Claymont, Del.
Interior Dept.	Not given	Feb. 9, 1938	60,721	Not given	Columbia Steel Co., Denver Truscon Steel Co., Los Angeles Republic Steel Corp., Cleveland Youngstown Sheet & Tube Co. Bethlehem Steel Co., San Francisco Laclede Steel Co., St. Louis Colorado Fuel & Iron Co., Pueblo, Colo.
Interior Dept.	Not given	July 22, 1938	19,027	Not given	Bethlehem Steel Co. Blue Diamond Co., San Francisco Judson Steel Co., Oakland, Calif. Laclede Steel Co., St. Louis Bethlehem Steel Co., Los Angeles. Northwestern Rolling Mill Co., Seattle Tennessee Coal, Iron & Railroad Co, Birmingham Colorado Fuel & Iron Co., Pueblo, Colo.
War Dept.	314-38-671	June 2, 1938	Not given	Not given	Sharon Steel Corp., Sharon, Pa. Weirton Steel Co., Weirton, W. Va. American Rolling Mill Co., Middletown, Ohio Jones & Laughlin Steel Corp., Pittsburgh Bethlehem Steel Co. Republic Steel Corp., Cleveland Jas. T. Ryerson, Chicago Youngstown Sheet & Tube Co. Great Lakes Steel Co., Detroit Carnegie-Illinois Steel Corp.

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158 The evidence presented above gives us a picture of an economically unified industry. The geographical regions are not self-contained marketing areas, nor are the various producing centers. Between the Northern and Southern geographic regions the levels of base rates were found to be so wide apart that a separate prevailing minimum wage was derived from a comparison of the base rates paid in the Southern plants. But there is nothing to parallel this situation in the industry as we look at it from East to West. The producing areas are small and especially in the Middle West and East there is a high degree of inter-competition. The West may be regarded as a geographic area but, as we have seen, there is no basic difference between the base rate level in the West and in the East. In the East a number of producing centers vary somewhat in the base rate which may be said to be predominant in these centers but, on the whole, the variations among them are not large. In only two instances in the East are the base rates in the producing centers on a substantially lower plane than in other producing centers in the same area. But in no case in the East, that is to say, the area from Chicago and St. Louis to and including New England do we find any variations on a regional basis. What we have for the most part is a goodly number of small geographic areas, among which there are variations in the base rates to a limited extent and among which there are no lines of economic demarcation. This, in brief, is the situation with respect to the geographic location of plants. We do not believe that the geographic location of the plants offers a sound basis for separate findings of prevailing minimum wages, except the geographic division that has been made between the North and the South. And we may say at this point that the separate wage applicable to the South has been recognized only because it is plainly indicated by the base rate structure of the industry. In view of the inter-regional competition between North and South, it would not be in keeping with the objectives of the Public Contracts Act if the lower wage were to be the source of an advantage in bidding for Government contracts. We recommend, therefore, in connection with the finding of a lower minimum wage for the South, that the Public Contracts Board, subsequent to a wage determina-

tion in this industry, report to the Secretary of Labor the effect of such lower wage in the South on the competition for Government business.

It has been urged especially that the Middle West and a part of the East be divided from the remainder of the East and prevailing minimum wages be found for separate geographical areas. The Wage district described in the Code as district number one has been proposed as the proper geographical basis for a separate finding of a prevailing minimum wage. This district was drawn to include the territory north of Virginia and East of a line drawn through the most easterly point of Altoona, Pennsylvania, the part of Maryland west of such line and certain counties in West Virginia (Exhibit M, p. 23). In effect, the Code district number one included the industry east of the Pittsburgh area with the exception of the areas around Johnstown and Buffalo which were separate wage districts under the Code. Thus, if the geographic areas set up under the Code were to be followed here there would be three separate areas east of Pittsburgh.

As we have seen above, the base rates in the Johnstown plants are somewhat lower than in the plants a short distance to the Westward in the Pittsburgh vicinity and somewhat higher than in the plants in the Harrisburg area, a short distance to the Eastward. The base rates in the Buffalo plants are on the whole slightly above the Harrisburg rate and somewhat above the rate predominating in the Pittsburgh and Harrisburg areas. In distance, Buffalo is not over 200 miles from these other producing centers. It has been pointed out that the predominating wages in Johnstown, Buffalo and in the vicinity of Harrisburg and Bethlehem are shaped by the extensive employment
159 in the large integrated operations of these adjacent producing centers. The predominant wages are the result of the same type of industrial operation. The base rate structure of these producing centers is fundamentally similar in character and the variations between them are minor. Distances in miles between these centers are relatively short and they cannot be said to be separate economic areas, distinct from each other, or for that matter, from the other producing centers in the industry.

With respect to the geographic area described as Code district number one we have seen that it is composed of a number of producing centers some of which exhibit a similarity of wage structure and some of which differ from each other. The strength of the base rate of 56.5 cents is found in the vicinity of Baltimore, Philadelphia, Harrisburg, Bethlehem, Syracuse and in New Jersey. But this rate is not the predominant rate in other integral parts of this geographic area. Around Troy, New York as it has been seen above there is a small producing center in which the level of base rates is lower than in any of the industry's producing centers outside the South. And in New England, which is a large segment of the Code district number one, the base rate level falls either above or below the 56.5-cent rate. If the Code district number one were to be considered as the geographic basis for a separate prevailing minimum wage, it would be necessary to cut it up into at least three separate areas in order to meet the variations among the predominant base rates. Between the Troy and the New England areas on the East and the Buffalo and Johnstown areas on the West, the area in which 56.5 cents is the predominating base rate would be confined to a relatively small area running from Baltimore through central and eastern Pennsylvania and New Jersey to Syracuse.

We do not believe that numerous producing centers and combinations of producing centers into relatively small geographic areas offer the proper foundation for the findings in the present proceedings. We refer now to the geographic areas among which there are variations in the level of base rates, whether these areas be in the East, the Middle West or the Far West. Unless there is something distinctive in the wage structure of a geographic region, or unless the economic relations of the smaller segments of the industry are provincial in character, the impelling reasons for separate findings of the prevailing minimum wage are not present.

In our survey of the base rate structure of the industry across the North and the West, we have not found that the numerous variations in base rates call for particular treatment along geographic lines apart from the remainder of the industry. On the whole, the variations in base rates

among producing centers are relatively small. The variations occur in numerous producing centers which in many instances are immediately adjacent. Competition for Government business goes on without regard for geographic lines which might serve to cut the industry into separate wage areas.

The recognition of the particular base rate levels in the considerable number of producing centers where they are a variable factor might be a satisfactory approach to the problem of minimum wages in the industry if the purpose of these proceedings was to perpetuate the local wage variations, as under the Code. But the purpose of these proceedings is to find the prevailing minimum wage which will serve the Government as an effective wage standard in its contract for iron and steel. It is necessary that the minimum wage standard for this purpose be as broad in its scope as possible. Both the requirements of the
160 Government for a wage standard and the economic characteristics of the industry's markets require that a broad view of the entire wage structure of the industry in the North and West be taken, rather than a particular view of numerous local wage levels.

Hitherto we have not dwelt at any length on the outstanding uniformity and concentration in the base rate structure of the industry. Above on page 76 it was said that none of the other base rates approaches the 62.5-cent rate in the number of plants in which this rate is paid, in the total number of workers in these plants and in the total number of workers receiving the rate. The extent of the predominance of 62.5 cents in the base rate structure is shown by the following figures. Of the 213 plants reported in the table above on page 103, the 62.5-cent base rate is paid in 101. 200,466 of the total of 299,769 workers are employed in these plants. 14,669 of the 24,747 common laborers being paid the base rates are paid the 62.5-cent rate. In terms of percentages 66.9 per cent of all the workers are in the plants paying 62.5 cents as a base rate and 59.3 per cent of the common laborers are paid the 62.5-cent rate.

We have seen above that for the purpose of finding a prevailing minimum wage which will serve the Government as a wage standard in its contracts with the iron and steel

industry the economics of the industry make it necessary to consider the base rate structure of the industry as a whole. It has developed that the base rate structure of the South requires that it be treated as a region apart. But this has not been found to be the requirement in the remainder of the industry. In the base rate structure of the greater part of the industry the 62.5-cent base rate is unquestionably the predominant rate.

It has been said that the 62.5-cent rate is not representative of the geography of the industry in the North and West. But we have seen that geography is not a primary factor in shaping the extent of the markets of the major part of the industry whatever its significance may be as a factor in the determination of the relative costs of operation. The various base rates reflect these varying costs of production and the wage standard sought after in these proceedings is derived from a comparison of the minimum wage practices of the industry. The predominating minimum wage practice that the industry has worked out for itself, as measured by the relative numbers of workers receiving the various minimum wages, is taken to be the prevailing minimum wage.

It hardly needs further comparisons to show the outstanding nature of the 62.5-cent rate but the productive capacity of the plants in which the rate is paid as compared with the total productive capacity of the industry, North and South, is as follows: The 62.5-cent plants account for 60.6 per cent of the industry's pig iron capacity, 65.7 per cent of the ingot capacity and 60.6 per cent of the finished hot rolled product capacity.

We have seen that the characteristic mode of production for the largest part of the industry was through the large company operating large integrated plants. With the exception of one large company, the principal operations in the industry are carried on in plants paying the 62.5-cent rate. We have also seen that the more important rates in the scale, 56.5, 58.5 and 59.5 cents are characterized by the operations of the second largest company in the industry and that these rates are shaped largely by the large integrated operations of this company. The 62.5-cent rate, thus, is entirely representative of the principal factor

shaping the larger concentrations of workers in the base rate table.

161 On the basis of all the evidence in the record we find 62.5 cents to be the prevailing minimum wage in the following states: Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, New Jersey, Maryland, Delaware, West Virginia, Kentucky, Ohio, Indiana, Michigan, Wisconsin, Illinois, Missouri, Iowa, Minnesota, North Dakota, South Dakota, Nebraska, Kansas, New Mexico, Colorado, Wyoming, Montana, Idaho, Utah, Arizona, Nevada, California, Oregon, Washington, and the District of Columbia.

162 VII

Reports were received from 102 companies operating 215 plants with respect to the number of workers and the classification of workers being paid rates below the common labor base rates. Of these, 34 companies operating 146 plants reported the employment of workers at wages below the base rates.

In the following table is presented the data on workers paid below the base rates for common labor. This table gives the names of the companies reporting the employment of such workers, the number of workers reported at wages below the base rates, and the classification and rates paid to such workers. A total of 3,740 workers were reported to be receiving wages below the base rates. But of this number, 458 are beyond the scope of the Act and have not been included in the table below.

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WAGES BELOW THE BASE RATE

Name of Plant and Location	Number of Employees Below the Base Rate	Hourly Wage	Classification and Remarks
Pittsburgh Steel Co., Pittsburgh, Pa.	29	Not given	Apprentices; learners
Sharon Steel Corp., Sharon, Pa.	1	" "	Apprentice
Jones & Laughlin Steel Corp., Pittsburgh, Pa.	3	34¢-48.5¢	3 apprentices
" " " " " Aliquippa, Pa.	147	50¢ 52¢ 56¢	9 female assorters; 35 assistant assorters 93 assorters; 7 gage pickers; 3 analyzers
Weirton Steel Co., Steubenville, Ohio	176	56-1/2¢ 54¢	171 female assorters; 5 superannuated employees
Weirton Steel Co., Weirton, W. Va.	185	56-1/2¢	female assorters
Great Lakes Steel Corp., Ecorse and Delray, Mich. (3 plants)	74	59-1/2¢ and upward	Apprentices
Wrought Iron Co., Lebanon, Pa.	29	35¢ 35-1/2¢ 41¢ 43¢ 43-1/4¢ 45¢	1 roller operator; 8 nutters; 2 pilers; 3 burring operators; 2 pointing operators; 2 wrappers; 10 threading operators 1 machinist apprentice
American Steel & Wire Co., Cleveland, Ohio	5	57-1/2¢ 60-1/2¢	1 utility girl; 4 apprentices

(continued)

American Steel & Wire Co., Allentown, Pa.	1	54-1/2¢	Apprentice
" " " " " Donora, Pa.	15	51-1/2¢	15 nail assorters
" " " " " DeKalb, Ill.	5	58¢	Binders
" " " " " Waukegan, Ill.	2	60-1/2¢	2 apprentices
	1	62¢	Sweeper
" " " " " Trenton, N. J.	1	60-1/2¢	Apprentice
Carnegie-Illinois Steel Corp., Gary, Ind.	335	51-1/2¢	3 apprentices; 3 coil keepers
		52-1/2¢	7 cover operators;
		56¢	5 apprentices; 295 assorters; 10 stampers; 9 runway operators;
		59¢	3 bloom tracers
" " " " " South Chicago, Ill.	17	51-1/2¢	5 apprentices;
		52-1/2¢	12 door operators
" " " " " Johnstown, Pa.	2	54¢	1 apprentice;
		55¢	1 special laborer
" " " " " Bessemer, Pa.	15	57-1/2¢	15 trade apprentices
" " " " " Clairton, Pa.	6	61¢	6 apprentices
" " " " " Duquesne, Pa.	11	61¢	11 apprentices
" " " " " Farrell, Pa.	78	47¢	8 assorter learners;
		56¢	70 assorters
" " " " " Irvin, Pa.	85	47¢	31 assorter learners;
		56¢	54 assorters
" " " " " Martins Ferry, Ohio	80	56¢	2 defect allocators; 78 assorters

(Continued)

Carnegie-Illinois Steel Corp., Mingo Junction, Ohio	2	61¢	2 apprentices
" " " " Munhall, Pa	54	42¢	29 door operators;
		48-1/2¢	5 helpers;
		51¢	1 rivet heater;
		57-1/2¢	11 apprentices; 8 special laborers
" " " " New Castle, Pa.	134	56¢	134 assorters
" " " " Vandergrift Pa.	19	54-1/2¢	3 steel samplers;
		61¢	16 trade apprentices
" " " " Youngstown, Ohio	37	48¢	7 test carriers;
		52-1/2¢	23 door operators;
		57-1/2¢	2 apprentices;
		58¢	3 test carriers;
		61-1/2¢	2 stock weighers
National Tube Co., Lorain, Ohio	10	53¢	Apprentices
" " " Ellwood City, Pa.	19	53¢	19 apprentices
" " " McKeesport, Pa.	13	53¢	13 apprentices
Tennessee Coal, Iron & Railroad Co., Birmingham, Ala.	43	32¢	22 trade apprentices;
		35¢	21 assorter learners
Carpenter Steel Co., Kenilworth, N. J.	3	45¢	1 common laborer;
		49¢	1 common laborer;
		55¢	1 common laborer
" " " Reading, Pa.	10	25¢	2 apprentices;
		39¢	4 apprentices;
		44¢	3 apprentices;
		49¢	1 apprentice

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(continued)

American Tube & Stamping Plant,	Bridgeport, Conn.
Youngstown Sheet & Tube Co.,	Chicago District
" " " " "	Youngstown District
Crucible Steel Co. of America,	Harrison, N. J.
Sheffield Steel Corp.,	St. Louis, Mo.
American Rolling Mill Co.,	Middletown, Ohio
Wheeling Steel Corp.,	4 Ohio plants

38	45¢	3 superannuated employees;
	50¢	35 " "
102	47-60-1/2¢	Female workers and apprentices; 81 of 102 receive 56¢ per hour, 6 receive less than 56¢, and 15 receive more than 56¢
33	45-61¢	Female workers and apprentices; 12 of 33 receive 52¢ per hour and 9 of 33 receive 53-1/2¢ per hour; the remainder varies from 45¢ to 61¢ as shown.
10	35¢	2 apprentices;
	35-1/2¢	1 learner;
	45¢	6 apprentices;
	48¢	1 learner
7	50¢	6 laborers;
	53¢	1 laborer
22	52¢	1 apprentice;
	54¢	5 apprentices;
	57¢	10 apprentices;
	59¢	1 apprentice;
	60¢	5 apprentices
305	42-1/2¢	1 female employee;
	48-1/2¢	44 class C female assorters;
	50-1/2¢	6 apprentices;

(continued)

Wheeling Steel Corp., 4 Ohio plants (Con'd.)	
" " "	2 West Virginia plants
Inland Steel Co.,	Indiana Harbor, Ind.
Republic Steel Corp.,	Gadsden, Ala.
" " "	Chicago, Ill.
" " "	Monroe, Mich.
" " "	Canton and Massillon, Ohio
" " "	Niles and Warren, Ohio

	52¢	4 apprentices;
	53-1/2¢-60¢	14 apprentices;
	52-1/2¢	27 class B female assorters;
	56-1/2¢	209 class A female assorters
1	50¢	Apprentice
105	55¢	2 apprentices;
	56¢	86 female assorters;
	57¢	3 apprentices;
	58¢	3 apprentices;
	59¢	7 women weight pickers;
	62¢	4 apprentices
9	30¢	1 apprentice;
	31¢	8 apprentices
14	55-1/2¢	1 apprentice; 2 billet paint and stamp boys; 5 metallurgical students;
	58-1/2¢	3 apprentices;
	59-1/2¢	2 apprentices;
	61-1/2¢	1 apprentice
4	55-1/2¢	1 apprentice;
	61-1/2¢	3 apprentices
3	55-1/2¢	1 apprentice;
	56¢	1 apprentice;
	58-1/2¢	1 apprentice
150	53¢	18 assorters;
	56¢	124 assorters; 4 clerks and scale girls; 2 floor ladies;
	59-1/2¢	2 apprentices

(continued)

132.

Republic Steel Corp., Youngstown, Ohio

Bethlehem Steel Co., Bethlehem, Pa.

" " " Coatesville, Pa.

" " " Johnstown, Pa.

" " " Lebanon, Pa.

" " " Sparrows Point, Md.

" " " Steelton, Pa.

Granite City Steel Co., Granite City, Ill.

1	55-1/2¢	1 apprentice
114	40¢	83 apprentices;
	45-1/2¢	27 apprentices;
	50-1/2¢	3 learners;
	51¢	1 apprentice
1	47-1/2¢	Forgeman helper
128	45-1/2¢	12 apprentices; 6 assorters;
	51¢	77 apprentices; 1 forelady; 2 stencil boys;
	56-1/2¢	30 apprentices
13	37-1/2¢	2 apprentices;
	43¢	8 apprentices;
	51¢	3 apprentices
329	40¢	21 apprentices;
	45-1/2¢	26 apprentices;
	51¢	8 assorters; 24 apprentices;
	54¢	1 forelady;
	55-1/2¢	249 assorters
35	40¢	12 apprentices;
	45-1/2¢	22 apprentices;
	50-1/2¢	1 yard cleaner (handicapped)
4	55¢	1 superannuated load inspector; 3 checkers;
1	57-1/2¢	1 scrap weigher

(continued)

Braeburn Alloy Steel Corp., Braeburn, Pa.

133.

Latrobe Electric Steel Co., Latrobe, Pa.

Apollo Steel Co., Apollo, Pa.

Milton Mfg. Co., Milton, Pa.

Phoenix Iron Co., Phoenixville, Pa.

Buffalo Bolt Co., North Tonawanda, N. Y.

Superior Sheet Steel Co., Canton, Ohio

Chapman Price Steel Co., Indianapolis, Ind.

Erie Forge Co., Erie, Pa.

Erie Forge & Steel Co., Erie, Pa.

Worcester Pressed Steel Co., Worcester, Mass.

Calumet Steel Co., Chicago Heights, Ill.

The Pollak Steel Co., Marion, Ohio

7	55¢	2 apprentices; 5 female inspectors
4	58-1/2¢	Apprentices
3	45¢	Sweepers
26	Not given	19 women nutting bolts; 6 women machine operators 1 apprentice
8	45¢ 55-1/2¢ 56-4/10¢	4 apprentices; 3 apprentices; 1 store room helper
115	Not given	Machine tenders; bolt and nut sorters
1	" "	Not specified
4	" "	" "
2	" "	2 apprentices
9	" "	9 apprentices
7	" " " "	6 light press operators; 1 sweeper
10	40¢ upward	Apprentices
10	40-50¢	Messengers and superannuated employees

170 The workers being paid wages below the base rates are employed in large, medium and small-sized companies and in plants located in all parts of the country. However, it is in the plants of the large Eastern companies that most of the workers receiving rates below the base rates are found. This is due, no doubt, to the fact that these companies produce the bulk of the tin plate produced by the industry and employ a majority of the apprentices employed in the industry. It is certain workers employed in the tin plate mills and the apprentices that account for the greatest portion of the workers being paid at wages below the common labor base rates.

In the tin plate plants women are employed as assorters. The wages of assorters are generally ten per cent below the wages of common labor. This is the general practice of the industry, for instance, when the base rates are 62.5 cents the assorters will be paid 56.5 cents. Approximately 90 per cent of the assorters reported receive from 55.5 to 56.5 cents an hour, inclusive, showing that this classification of workers is found primarily in the higher wage-paying sections of the industry. In fact, 80 per cent of the assorters are employed in plants where the base rate for common labor is 62.5 cents an hour. The assorter classification is regarded as a distinct group and is discussed in the record at pages 26, 292, 314, 446, 615, and 639. Of the 3,282 workers paid less than the base rates for common labor to whom the provisions of the Act might be applicable, 1,871 are classified as assorters.

Since the basis of the wage determination here is the common labor base rate, it has not been thought advisable to combine with these rates the lower rates of the assorters. It has been found that the Government has purchased no tin plate subject to the provisions of the Act and, hence, the production of tin plate has been excluded from the definition of the industry adopted as applicable in these proceedings. We would recommend, however, that further study be made of the rates paid assorters in the production of tin and if investigation should indicate the desirability of including the production of tin plate within the scope of a wage determination for the iron and steel industry that further findings and recommendations be made by the Board in this matter.

714 apprentices were reported to be receiving wages below the base rates. Apprentice rates may go higher than the base rates but where these were reported we have not considered them in the analysis here. The lowest apprentice rate reported is 25 cents an hour. Apprentice rates as reported covered a wide amount of variation. The data showing the number of apprentices do not exhibit any special tendency to concentrate at any particular rate or rates. The 714 apprentices referred to here are employed by 21 companies. The types of apprenticeship in the reported plants were discussed in the record on pages 244, 245, 617, 618, 619, 631, 639, 640, 648, 652, 657, 662, 678, 679, 716. From this discussion it would seem clear that apprenticeship in the iron and steel industry has a well-defined and well-understood meaning. It would seem that a general practice of the industry would be adhered to if apprenticeship were considered for the purposes of these proceedings to be a system of employment and training which is in conformity with the standards of the Federal Committee on Apprenticeship. We recommend that an allowance be made in the determination of this case for the employment of apprentices at wages less than the prevailing minimum wages, provided that the employer has on file an active indenture entered into in accordance with the standards of the Federal Committee on Apprenticeship.

171 VIII

In a number of briefs and through testimony at the hearing it has been urged that the small and medium-sized iron and steel producers be given consideration in a category apart from the large companies (R 11, 237, 263, 331, 348, 378, 489, 558, 696, 697, 706; 710, 714, 756, 758, 775, 817, 1091, 1140, 1177).

It is contended by some of the companies referred to above that their plants occupy a geographic position which places them at a disadvantage in the marketing of their products. And the contention is generally advanced that as compared with the few large companies in the industry the smaller companies carry on under the handicap of less efficiency and greater costs of production.

The evidence in the record has permitted us to give detailed consideration to the factor of plant location as it

is related to the base rate structure of the industry and the findings of prevailing minimum wages made above in Section VI have been made in the light of the location factor. With respect to the possible lower efficiency and greater costs of the smaller as compared with the larger companies, there is very little evidence in the record which would throw light on the situation. The facts which would support or disclaim this contention were not put into the record of these proceedings by the interested parties. Furthermore we do not know from the record whether less efficiency and greater costs, if established by the facts, would furnish a valid reason for the separate consideration of the smaller company in the determination of the industry's prevailing minimum wages.

We believe that the position of the smaller companies in the competition for Government business as it is affected by the prevailing minimum wages found above should be made the subject of further study and, if necessary, further findings and recommendations. We recommend a further study of this question for the following reason. The prevailing minimum wages found above in Section VI, as has been pointed out, have been shaped primarily by the large integrated operations of the large companies. The overwhelming position of the large companies in the industry sets the pace for the industry and this is as true with respect to the minimum wages prevailing as it is of the other phases of operation in the industry. It has been very distinctly brought out in the analysis of factors influencing the minimum wage structure of the industry that the smaller company exerts a negligible influence in shaping the uniformities and concentrations in the base rate scale from which the prevailing minimum wages have been derived.

The smaller iron and steel companies have, of course, a resort to Section 6 of the Public Contracts Act as a means of securing relief from the application of the prevailing minimum wages found above to their contractual relations with the Government. As a matter of fact, this avenue of relief is open to all members of the industry regardless of size.

By recommending further study of the position of the smaller companies we do not mean that the application of

the minimum wages found here to be prevailing should be held up pending the results of such study. The minimum wages in this industry, as we have seen, prevail regardless of the wage data of the smaller companies. Furthermore, the study suggested would be concerned primarily with the effect of the wage determination on the competitive position of the smaller companies in bidding for Government contracts.

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172 Recommendations of the Public Contracts Board to the Secretary of Labor in the Matter of Prevailing Minimum Wages in the Iron and Steel Industry.

In view of the Findings of Fact made above, the Public Contracts Board respectfully recommends to the Secretary of Labor that the following wages be determined, within the meaning of section 1(b) of the Public Contracts Act, to be the prevailing minimum wages for the manufacture or furnishing of the products of the Iron and Steel Industry.

(1) 45 cents an hour within the area made up of the States of Louisiana, Arkansas, Mississippi, North Carolina, South Carolina, Florida, Oklahoma, Texas, Alabama, Tennessee, Georgia, and Virginia.

(2) 62.5 cents an hour within the area made up of the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, New Jersey, Maryland, Delaware, West Virginia, Kentucky, Ohio, Indiana, Michigan, Wisconsin, Illinois, Missouri, Iowa, Minnesota, North Dakota, South Dakota, Nebraska, Kansas, New Mexico, Colorado, Wyoming, Montana, Idaho, Utah, Arizona, Nevada, California, Oregon, Washington, and the District of Columbia.

The Board recommends further

(1) that the minimum wages paid in the manufacture of tin plate, tin mill black plate, and terneplate be given further study in order to determine whether or not such minimum wages should be made the subject of separate Findings of Fact by the Board;

(2) that subsequent to a determination that the prevailing minimum wages in the Iron and Steel Industry are 45 cents in the South and 62.5 cents in the remainder of the

industry, a study, and if necessary, further Findings of Fact be made with respect to the effect of the lower minimum wage on the competition in the industry for Government business;

(3) that subsequent to a wage determination for the Iron and Steel Industry, a study be made of the position of the smaller companies in the competition for Government business in order that the Board may be placed in a position to advise the Secretary of Labor with respect to requests for exemptions under section 6 of the Act, should the occasion arise;

(4) that an allowance be made in the determination of this case for the employment of apprentices at wages less than the prevailing minimum wages, provided that the employer has on file an active indenture entered into in accordance with the standards of the Federal Committee on Apprenticeship.

173 The Above Findings of Fact and Recommendations are Respectfully Submitted to the Secretary of Labor

THE PUBLIC CONTRACTS BOARD
THOMAS HOLLAND
ROBT. N. CAMPBELL

174 Opinion of Minority
in the Matter of Prevailing
Minimum Wages in the Iron and
Steel Industry

The Board has given much time and study to the testimony made available to it in the public hearing of the iron and steel industry. It has also studied the briefs and other communications submitted subsequent to the hearing in accordance with permission extended for the presentation of such material. I am in agreement with the majority of the Board that the information before it is entirely adequate for a finding of the prevailing minimum wages in the industry. No differences of opinion arose in the Board over analysis of the testimony which were not or could not be reconciled. The Board is agreed on all the essential facts before it in the case.

In weighing these facts, in judging the comparative value of certain deviations from the predominant wage prac-

tices, and in appraising the extent of influence of possible alternate geographical divisions, especially in the various phases of competitive advantages or disadvantages in bidding on government contracts, on the other hand, divergencies of opinion developed. While there was no disagreement on the general question of the recognition of geographical wage differentials, differences arose with respect to the number of such differentials and the delimitations of the various districts or regions to which each wage would be applicable.

Any case such as the present one, in which minimum wages show a varying lack of uniformity, very narrow and unusual in some sections, and wider and rather common in others, gives ample occasion for differences of opinion with respect to proper segregation of wage areas. While it might be thought that the law itself disposes of these questions, and that the function of applying the law should be limited to the finding of facts, the matter in reality is not so simple. Diversity of facts, not only within localities but between localities and groups of localities, irregular contours of regions in which various parts of the industry are concentrated, and other variations, made the exercise of judgment in this case, as they would in any similar case, inescapable. No more statistical operation was sufficient to dispose of the issues. In some instances, in the present case an almost equal weight of contrary considerations impelled the judgment in opposite directions on a single point at issue. Elements extraneous to the statistical aggregates had therefore to be drawn upon to break the deadlock.

For example, one principal point of difference between the majority of the Board and the minority lay in the question of recognizing or not recognizing wage differentials in certain sections and not in others. It became a question not only of what magnitude of wage differences should justify the recognition of differentials, but of what complexion of wage frequencies in respect of company size and location, of what degree of predominance of given base wages in terms of numbers receiving them within a given region, should be deemed worthy of recognition. The same wage difference in one section might justify recognition and yet not in another. The frequency with which the differences occurred, the size of the plants involved, espe-

cially with respect to employment, location of the plants relative to the plants which observed different base rates, segregation or nonsegregation of the plants paying the same or similar rates in point of geographical location, uniformity or non-uniformity of differences within a given area—all these variables might congregate or fail to congregate in a manner to justify or not to justify recog-
175 nition of a differential. Nor is the magnitude of the difference in wages, for this reason, necessarily the determining factor; for a considerable difference within one region might be the exception, and in that case it would not rule, it would not set the pattern. A smaller difference within another region, on the other hand, might be so uniform and so general among plants located therein as to constitute it a proper one for recognition as a differential.

In the present case, the lower base wages generally paid in the region lying east of what is generally known as the Pittsburgh district, constitute it, in my opinion, a separate region with respect to the prevailing minimum wages. The majority of the Board does not so conclude.

The facts are given in the body of the Recommendations and require only very brief mention here.

The eastern district (as represented in the large sample before the Board), contains 59 plants employing 53,518 workers. Of these, 18 plants employing 38,069 workers pay a base rate of 56½ cents an hour. An additional 29 plants, employing a total of 7,647 workers pay base rates below 56½ cents; 5 plants employing 4,005 workers pay a base rate of 57 cents. Only 7 plants with 3,797 workers pay base rates over 57 cents an hour. Of these 7 there are 5 plants with 3,602 workers which pay 62½ cents.

The wage structure of this section with respect to base rates contrasts with the section to the west, exclusive of the far west, as follows:

This section, including Johnstown and Buffalo, (as represented in the data before the Board), has 147 plants employing 241,340 workers. Of these there are 96 plants employing 196,864 workers which observe a base rate of 62½ cents an hour. These plants are located from Pittsburgh west through Ohio and West Virginia, Indiana, and Illinois. Within this expanse there are only 3 plants having a base rate of 56½ cents and these plants employ only 878 work-

ers. The predominance of the 62½-cent rate is overwhelming. The only other base rates of any appreciable magnitude in point of employment are 58½ cents, 59½ cents, 55 cents, and 63 cents. Five plants with 11,005 workers have a base rate of 58½ cents; 7 plants with 9,721 workers have a base rate of 59½ cents; 7 plants with 5,684 workers have a base rate of 55 cents; and 3 plants with 4,961 workers have a base rate of 63 cents. The greatest concentration at any point other than 62½ cents is at 58½ cents, and the 5 plants with the latter base rate employ only 4.6% of the total number of workers in this region. The 99 plants, on the other hand, which observe a base rate of 62½ cents employ 81.6% of all the workers in the entire region. (Because of the tendency towards constancy of the proportion of employes at the base rate to the total, I have used totals instead of the number as the base rates, for the sake of simplicity.)

Here we have, in my view, two distinct regions with respect to the prevailing minimum wages. The contrary view, held by the majority, is that the rate of 62½ cents clearly predominates even if the region to which it is made applicable is extended to the Atlantic seaboard. This is demonstrably true. If the eastern section is added to the western, we have 206 plants employing 294,858 workers, and of this number 200,466 are employed in plants which adhere to the 62½ cent rate. In other words, the plants with this base rate employ 67.9% of all the workers. The plants with a base rate of 56½ cents, as has already been stated, employ only 38,947 workers or 13.2% of the 294,858 total. Obviously, the 62½ cent rate predominates,
176 even if the area of application is extended to the Atlantic seaboard. But so would it also still predominate if it were extended to the Gulf of Mexico and so be made to include the Birmingham area. But here common sense steps in and impels us to conclude that the gap between 45 cents and 62½ cents is too wide to be compromised or bridged. The question then would appear to be one of comparative magnitude of the actual difference between rates; but that is not the case. A 30-cent rate paid by a small company within the 62½ cent area could not affect the results. The question is rather a combination of

magnitude, frequency, uniformity and of other factors, mostly extraneous to statistics.

A question worth inquiring into, in view of the foregoing, is the greater relative predominance of the 62½ and 56½ cent rates (1) respectively in their own regions, and (2) of the 56½ cents in its own region, i. e., the eastern, and the 62½ in the western and eastern regions combined.

It has already been shown that the 62½ cent is the base rate of plants in the western region employing 81.6% of all the workers in that section. The 56½ cents, on the other hand, is paid by plants in the eastern region which employ only 71.1% of the workers in that area. Reference to the consolidated tables in the body of the Recommendation, however, shows that in the eastern region 4,005 additional workers are employed in plants with a base rate of 57 cents, a rate that is only ½ cent removed from the 56½ cent rate. If these 4,005 are added to the 38,069 at the 56½ cent rate, (a wholly reasonable consolidation), the plants employing these 42,074 workers will be found to have 78.6% of the total workers in the district. This compares favorably with the 81.6% in the case of the 62½ cents. On the other hand, in the western district plants employing 4,961 workers have a base rate of 63 cents, which is only ½ cent removed from 62½ cents. If these 4,961 are added to the 196,864 in the plants with the base rate of 62½ cents, we have a total of 201,825 or 83.6% of the total. The respective percentages of the 56½ (including 57) cent rate and of the 62½ (including the 63) cent rate, are therefore 78.6 and 83.6, and give us little to choose between.

If now we extend the western section to include the eastern we find the predominance of the 62½ cent rate reduced to 69.7%.

Now, obviously, should we rely purely on statistical aggregates, we would be confronted with no decisive divergence between these respective degrees of predominance. It is true that the 56½ cent (including the 57 cent base) predominates in the eastern region by about 10 percentage points over the 62½ cent (including the 63 cent base) rate in the western and eastern regions combined; but each rate predominates sufficiently in its area to be accepted as the prevailing minimum wage.

Consequently, in order to reach a conclusion, elements extraneous to the statistical results, as has already been said, must be given consideration. We must make a choice between frames of reference. Why should the Birmingham or Southern region be separated from the remainder of the country while the eastern region is merged? One reason has already been stated: the gap between 45 cents and 62½ cents is much greater than that between 56½ cents and 62½ cents. But that fact only imposes the question of how wide a difference must be in order that it should be recognized as a differential, other things being equal. In my opinion, a 6-cent differential qualifies a region for separate recognition if there are no countervailing factors of sufficient weight to overbear its significance.

177 It has been shown that there is little choice, statistically speaking, between the 62½ cent and 56½ cent rates, in point of relative predominance. If a 6-cent differential is of sufficient magnitude to justify its recognition by a separate wage determination for the area in which it is found, as I think it is, what factors could be present to overcome the differential? Evidently they are (1) the competitive advantage presumably inherent in the lower rate and (2) the danger to the higher wage structure lurking in this competitive advantage.

The Public Contracts Act contemplates the elimination of competitive advantage accruing to firms bidding on government contracts in excess of $10,000, if the advantage is derived from the payment of minimum wages which are below the *prevailing* minimum wages. The purpose is to protect the competitive position and therefore the wage structure of those firms which do adhere to minimum wages which are not lower than the prevailing minimum wages.

The law also permits the division of the country into localities for the purpose of determining minimum wages. No rule is laid down to define the extent of any locality; but common intelligence leads to the conclusion that in delimiting localities the realities of the wage structure in each industry should be taken into consideration. A too minute concept of locality would obviously nullify the law, for each plant must necessarily occupy a different locale or site from every other. To reduce the interpretation of locality to its most minute point would be to find a mini-

mum wage prevailing in each plant. This would be absurd. But when we deviate from this interpretation we are immediately thrown upon judgment. If more than one plant are to be considered together, how many may properly be considered together? How large a territory may be included in this merger?

Obviously, we must look for wage patterns or uniformities. If these exist, the problem is simplified. If they do not exist, and if there is no pattern, no satisfactory locality differentials can be drawn. If they do exist, there may yet be a varying number of exceptions to the predominant pattern. How should these exceptions be treated? Again judgment must be relied upon for the answer. What are the competitive factors involved in these exceptions? How important in point of magnitude and relative frequency are the exceptions? Can they be safely ignored? How far can differentials be recognized without violating the principal purpose of the law, which, as has been stated, is to prevent the firms which pay minimum wages below the prevailing minimum wages, from enjoying a competitive advantage?

These are not problems of differential calculus. They are questions of fact and judgment combined. Determinative elements lie in marketing radius, freight rates, the proportion that wages bear to selling price, etc.

In the light of these questions, we approach the question of the eastern area. If the firms located in that area are given separate treatment, if this area is to be recognized as a separate wage locality, will the effect tend to nullify the principal purpose of the Public Contracts Act? This question may best be answered by inquiring whether these firms do now enjoy a greater share of sales to the Government than their comparative size in point of output or capacity would allocate to them? If they do not, it may then be assumed that a continuation of the already established competitive equilibrium, such as would be assured if the 56½ cent rate were recognized as a differential, would not confer an advantage not already present. The status quo would remain undisturbed. No competitive advantage would be added or subtracted from the existing condition.

178 The allegation was made in the public hearing by the Steel Workers' Organizing Committee that the firm which in point of size predominates the eastern area, namely, the Bethlehem Steel Corporation, has obtained government contracts in excess of its proper share if the latter is judged by ingot capacity. This allegation was categorically denied by citation of relevant statistics in a brief filed by the company.

It is possible, of course, that because of specialization by product or because of the specialized equipment possessed by some of the smaller firms, adapting them especially to the production of certain steel products required by the Government, some of these firms may obtain a disproportionately large share of government contracts; but the decisive competitive factor in such cases would be specialization and not wages. Such firms would be successful bidders against the Bethlehem Corporation no less than against other corporations in the industry.

The evidence failed to establish as a fact that competitive advantages are enjoyed by the Bethlehem Steel Corporation because of the payment of lower wages by that firm. Until such evidence is produced, it cannot be assumed that it exists as a fact.

Competitive items which would otherwise confer advantages to firms located in the eastern district might be found in nearness to large consuming centers, comparative cheapness of iron ore, or in more economical production equipment. Disadvantages might lie in greater distance from raw material supplies, especially coal and iron ore, and greater distance from the western market. Possibly the new system of basing points recently established might confer or withdraw additional advantages.

But the Board does not have before it essential information on these points. It does know that the minimum wages prevailing in the eastern area are lower than those of the western area. If these lower wage rates could be shown to confer a competitive advantage in bidding on government contracts upon the companies operating in the eastern area, the necessary conclusion, in view of the object of the law, and in view of the general admission that the firms in the east compete extensively with those in the western area—the necessary conclusion, to repeat, would

be that no differential should be recognized. But no such showing has been made.

My conclusion, therefore, is that the eastern section should be recognized as a separate area and that the wages prevailing there should determine the rate that is to be established as a minimum for the region. Failure to effect this segregation, with the consequence that the minimum rate would be elevated to 62½ cents from 56½ cents or less, would confer a competitive advantage to a degree measured by the amount of wage readjustment which would be required in the east, upon the plants located in the western area. This effect could not be justified under the Act unless it could be shown conclusively that the result was no more than elimination of a condition which the Act was designed to accomplish. But if the existing competitive equilibrium has not placed a disproportionate share of government contracts into the hands of the eastern producers, the inclusion of the eastern area under the 62½ cent rate would be a gratuitous disruption of a wage structure which is not sweatshop in character and a gratuitous injury to firms which are not now engaged in wage practices which are the target of the Act.

To overlook, ignore or dismiss this conclusion involves either the assumption that a continuation of the 56½ cent rate would in the future confer a competitive advantage in government contracts upon the firms paying that
179 rate which the payment of that rate does not now confer, or the belief that continuation of this rate would in time undermine the 62½ cent rate. Such assumption or belief can find no support of fact in the evidence. Alternately, it appears to the minority, the forcible merging of the eastern with the western section would introduce a reallocation of comparative competitive advantages not in accordance with the object of the law, not confined to the end that objectionable competition would be eliminated but with the effect that an unearned and gratuitous advantage would be given to one area at the expense of another.

The Public Contracts Act is not a wage-raising Act as such. Such increases in wages as may be required as a result of minimum wage determinations under it are incidental to its principal purpose. If all firms in an appro-

priate area were found to pay the same minimal wage, the Act would require no increase in wages at all. In fact, such a condition has not been encountered in the experience of the Board; in all instances to date some increase in minimum wages has been required. But this has been the result of the non-uniform character of the various wage structures encountered, and not of any legal provision of the Act requiring elevation of minimum wages as such.

In view of the foregoing, the minority of the Board is of the opinion that the 56½ cent rate should be applied to the eastern section, so-called, comprising that part of the United States lying east of a line drawn north and south through the most easterly point of Altoona, Pennsylvania, to the northern boundary of the State of Maryland; and the States of Maryland and Delaware, with such exceptions as may be provided for through special exemptions or limitations.

Another difference arose in the Board with respect to the mid-western area located in the States of Indiana, Missouri, Southern Illinois, and Kentucky. The majority has concluded that the 62½ cent rate prevails in this area no less than in the adjoining states to the North and East. The facts are not dissimilar to those reviewed above in the case of the eastern and western areas. The various considerations of competition, location, etc., are also very similar.

A brief summary will suffice for the present purpose, since the essential facts are presented in the body of the Recommendation. Five plants in Missouri and southern Illinois, employing 5,074 workers adhere to base rates ranging from 55 cents to 58.5 cents. Of these, two plants employing 2,160 workers pay a base rate of 55 cents; one plant with 2,089 workers, pays a base rate of 58.5 cents. Two plants, with a total of 825 workers, pays 56.5 cents.

There is no base rate of 62.5 cents in the neighborhood. The range in actual rates is only 3.5 cents.

In central Indiana are located three plants which have a base rate of 55 cents. Their total employment is 2,456. A fourth plant employs 80 wage earners with a base rate of 60 cents. In northern Kentucky is one plant employing 2,500 workers at a base rate of 56 cents an hour. In both instances no plant with a base rate of 62½ cents is found within a considerable distance, with the exception of the

Kentucky plant. It is situated at no great distance from a plant in southwestern Ohio which has a base rate of 62½ cents; and in northeastern Kentucky is a plant which also has a base rate of 62½ cents.

180 An examination of Government contracts awarded during the past two years reveals no disproportionate share won by the firms referred to above. In fact, some of the firms have won no awards during that period of time.

For reasons similar to those offered in support of a differential applicable to the Eastern area the minority concludes that a differential is justified in the area under review here, and that denial of a differential would be contrary to the proper application of the law.

We find in the area here referred to 10,110 workers, employed by 10 plants. Of this number of workers, 4,616 are employed by plants which adhere to a 55-cent base rate; 2,500 by a plant with a base rate of 56 cents; 825 by plants paying a base rate of 56.5 cents; 2,089 by a plant paying 58.5 cents; and 80 by a plant paying 60 cents.

The most commonly paid rate is obviously 55 cents; and the minority of the Board is of the opinion that this rate should be applied to the States of Missouri and that part of Kentucky lying west of a line drawn north and south through the westernmost point of Boyd County; to that part of the State of Indiana lying south of a line drawn east and west from the northern boundary of Howard County; and to that part of Illinois lying south of a line drawn east and west from the northern boundary of Fayette County.

A third difference, one of a minor degree, relates to the far western area. The majority recommends a rate of 62½ cents. The facts are given in the body of the Recommendation and need not be repeated here, except in summary form. Of 4,911 workers reported to the Board in that area, 3,326 are employed by firms which pay a base rate of 60 cents an hour. 1,495 are employed by firms paying 58 cents, and 90 by a plant with a base rate of 65 cents.

I am of the opinion, in view of these facts, and in view of the great distance separating the far west from the nearest plants to the east, that a separate minimum should be applied to the Western States. The rate should, in my

opinion, be 60 cents and should apply in all the states lying west of Minnesota, Iowa, Missouri, Oklahoma, and Texas.

O. R. STRACKBEIN
Member Public Contracts Board

(541)

181 *Exhibit C*

United States Department of Labor
Division of Public Contracts

In the Matter of the Determination of the Prevailing Minimum Wages in the Iron and Steel Industry

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Petition of Committee Representing Small Eastern Producers of Iron and Steel Products for Reopening of Hearing.

182 United States Department of Labor
Division of Public Contracts

Petition for Reopening of Hearing

In the Matter of the Determination of the Prevailing Minimum Wages in the Iron and Steel Industry

To the Administrator, Division of Public Contracts

Sir:

A public hearing in the above-entitled matter was had before the Public Contracts Board on July 25 and 26, 1938. Subsequent to the hearing the Record was held open until August 8, 1938 for the submission of wage data and other evidence. The Record was then closed and interested parties were allowed until August 22, 1938 to file briefs. Under date of October 27, 1938 the Public Contracts Board made its Findings of Fact, Conclusions and Recommendation for the consideration of the Secretary of Labor.

The first notice that the members of the Iron and Steel Industry who are represented by your petitioners re-
183 ceived of such Findings of Fact, Conclusions and Recommendation was by a notice dated November 7, 1938, addressed by you to "All Persons Interested in the Matter of the Determination of the Prevailing Minimum Wages in the Iron and Steel Industry," with which there was enclosed a press release of the United States Department of Labor numbered (5603) and marked "For release Sunday, November 6, 1938". Such notice stated that briefs might be filed with the Administrator within 21 days from the date thereof, or until November 28, 1938, at which time the Board's recommendations, together with such briefs, would be forwarded to the Secretary of Labor. Your petitioners promptly requested of the Administrator that they be furnished with the full Report containing the Board's Findings, Conclusions and Recommendation, but such Report was not released until November 19, 1938, and copies thereof were not received by your petitioners before November 22, 1938. The notice of the Administrator dated November 19, 1938, which accompanied such copies stated that the time for filing briefs had been extended to December 10, 1938.

In addition to a recommendation for certain prevailing minimum wages in the Iron and Steel Industry the majority report of the Board makes certain additional recommendations, among which are the following (Report, p. 136):

"(2) that subsequent to a determination that the
184 prevailing minimum wages in the Iron and Steel Industry are 45 cents in the South and 62.5 cents in the remainder of the industry, a study, and if necessary, further Findings of Fact be made with respect to the effect of the lower minimum wage on the competition in the industry for Government business;

"(3) that subsequent to a wage determination for the Iron and Steel Industry, a study be made of the position of the smaller companies in the competition for Government business in order that the Board may be placed in a position to advise the Secretary of Labor with respect to requests for exemptions under section 6 of the Act, should the occasion arise;"

In view of the Findings of Fact, Conclusions and Recommendations made by the Board, and in view of the specific

recommendations for further study of certain features, it is, on behalf of small Eastern producers of iron and steel products, respectfully requested that the Administrator of the Division of Public Contracts resubmit the above-entitled matter to the Public Contracts Board for further investigation, hearing and recommendations. We hereinafter set forth our reasons for that request. We believe that they are so impelling as to require that the request be granted.

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I.

The recommended study of the position of the smaller companies in the Industry should be completed and appropriate recommendations based thereon should be made by the Board before the determination shall be promulgated by the Secretary of Labor, because the proposed determination will preclude the smaller Eastern producers of iron and steel products from competition for Government work.

Your petitioners believe that the majority of the Board in its Findings of Fact and Recommendations has not properly applied the provisions of the Public Contracts Act because it has failed to recognize and give effect to long existing wage differentials among the various localities in which the products of the Steel Industry are manufactured or furnished. The position of your petitioners in that regard will be more fully set forth in the exceptions and briefs which shall be filed on their behalf.

In its Report the majority of the Board indicates that chief among its reasons for recommending a uniform minimum wage for the entire North and West of the country are the existence of general competition among the plants in that region and the belief that "the requirements of the Government for a wage standard and the economic characteristics of the industry's markets require that a broad view of the entire wage structure of the industry in the

186 North and West be taken, rather than a particular view of numerous local wage levels". (Report, p. 124). As we have pointed out above it is our contention that the position thus taken by the majority of the Board is not the correct position under the Act, but, if it is correct, then it is submitted that, before recommending that the Secretary of Labor make a determination of a uni-

form prevailing minimum wage for the North and West, the Board is bound to obtain adequate evidence with regard to, and to give due consideration to, the probable effect of such determination upon competitive conditions in the Industry. In making its recommendation for a further study of the position of the smaller companies in the industry the Board concedes that it has not as yet obtained adequate evidence on which to determine the effect of the proposed determination upon the competitive positions of the smaller companies.

In Section VIII of its Report (p. 135) the majority of the Board makes certain findings and conclusions concerning a future consideration of the position of the small and medium-sized iron and steel producers as compared with the large companies. The Report of the majority of the Board states (p. 135):

"By recommending further study of the position of the smaller companies we do not mean that the application of the minimum wages found here to be prevailing should be held up pending the results of such study. The minimum wages in this industry, as we have seen, prevail re-
187 gardless of the wage data of the smaller companies. Futhermore, the study suggested would be concerned primarily with the effect of the wage determination on the competitive position of the smaller companies in bidding for Government contracts."

In analyzing that recommendation of the Board consideration must be given first to the practical effects of a prior wage determination as recommended by the Board and a subsequent study of the position of the smaller companies. The majority of the Board finds (Report, p. 135):

"The overwhelming position of the large companies in the industry sets the pace for the industry and this is as true with respect to the minimum wages prevailing as it is of the other phases of operation in the industry."

If a determination of the rates as recommended by the majority of the Board shall be promulgated, practically all plants in the Eastern section of the country must revise all production wage rates upward. It may be argued that companies that have no interest in bidding for Government work will not be compelled by such determination to revise their wage rates. The Board, however, has

found to the contrary. The large companies set the pace for the industry. The small companies with plants located in the vicinity of plants of large companies whose rates are affected must revise their own rates comparably upward in order to maintain an adequate labor supply.
188 The mere publication of such a determination will make for labor unrest and demands for pay increases.

As we shall show hereinafter we believe that a determination in accordance with the recommendation of the majority of the Board will result in a general disturbance of wage rates throughout the Industry and also in other industries in the localities in which the plants of the Industry are situated. In any case such a determination will force an immediate upward revision of the wage rates of all small Eastern producers who bid on Government work. Applications for exemption from the proposed wage determination cannot be passed upon with any degree of celerity. In fact the Board's suggestion that the smaller companies may apply for exemptions under Section 6 of the Act is not only illogical but absolutely impractical. The pertinent provisions of Section 6 of the Act read:

"Upon a written finding by the head of the contracting agency or department that the inclusion in the proposal or contract of the representations or stipulations set forth in section 1 will seriously impair the conduct of Government business, the Secretary of Labor shall make exceptions in specific cases or otherwise when justice or public interest will be served thereby. Upon the joint recommendation of the contracting agency and the contractor, the Secretary of Labor may modify the terms of an existing contract respecting rates of pay and maximum hours of labor as he may find necessary and proper in
189 the public interest or to prevent injustice and undue hardship. The Secretary of Labor may provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act respecting minimum rates of pay and maximum hours of labor or the extent of the application of this Act to contractors, as hereinbefore described."

The regulations, Article 601, of the Department of Labor set up the procedure for obtaining exemptions as follows:

"Request for the exception or exemption of a contract or class of contracts from the inclusion or application of one or more of those stipulations required by article 1 must be made by the head of a contracting agency or department and shall be accompanied with a finding by him setting forth reasons why such inclusion or application will seriously impair the conduct of Government business.

"Request for the exception or exemption of a stipulation respecting minimum rates of pay and maximum hours of labor contained in an existing contract must be made jointly by the head of the contracting agency and the contractor and shall be accompanied with a joint finding by them setting forth reasons why such exception or exemption is desired."

It appears that the Board does not have in mind the exemption of a class of contracts, because it finds
190 that both large and small companies bid for Government work (Report, pp. 120-121). Under the above quoted regulations a request for an exception or exemption before the contract is let must come from the head of the contracting agency or department and not from the contractor. It seems clear that any such request could be granted only with respect to all companies who might bid for a particular contract or contracts and that it could not be granted in favor of some one or more bidders and not in favor of all bidders. A request under the second paragraph above quoted could only be made after the bids had been opened and the contract had been awarded, when it would be too late for the contractor to withdraw. Few, if any, bidders would wish to take such a chance. Of what value, therefore, to the small companies is a subsequent finding that they be given special consideration? It is locking the stable door after the horse is stolen.

In truth, what is this investigation which the Board suggests with respect to the smaller companies? Is it to discover whether they are important to the Government? It cannot be that, for the Board's Report (p. 118) lists several that have taken Government work and its chart of

bidders (pp. 120-121) lists several more that have entered competition for such work.

Is it the purpose of the Board that competition for Government work be limited only to the large companies?

The Report indicates that the Board believes that
191 there is enough equity and justice in the position of the smaller companies to warrant possible recommendations that they be granted exemptions from any minimum wage determination under the Public Contracts Act.

But under the existing precedents applicable to procedure under the Public Contracts Act there can be no general exemptions of smaller companies. In a memorandum of the Acting Solicitor of Labor to the Administrator of the Public Contracts Act, dated August 10, 1938, after stating his opinion that the Secretary of Labor may not create a minimum wage differential based upon the size of companies within an industry, the Acting Solicitor says with regard to the suggestion that exemptions may be granted to the small companies under Section 6 of the Act:

"It should be noted that Congress expressly stipulated that variations, tolerances or exemptions under the Public Contracts Act must be 'reasonable' (Section 6 of the Act). This requirement would subject any determination of the Secretary to judicial review and the court's interpretation of what is reasonable. To my knowledge, there have been no court decisions upon minimum wage determinations involving differentials based on the size of companies. Nor has there been such a differential under any of the federal wage rate orders, any of the state minimum wage decisions or any of the N. R. A. code rates. In view of these circumstances, as well as the instructions of Congress
192 concerning the wages paid in a locality, I do not believe that such a differential would be held reasonable."

Even if the Act permitted such exemptions in favor of the smaller companies, the granting of such exemptions would be of little or no practical benefit to those smaller companies whose plants are located in or near localities in which the plants of larger companies that would be required to pay the higher rate established by the determina-

tion of the Secretary of Labor are located, because such smaller companies would be unable to maintain an adequate labor supply at wage rates considerably lower than those paid at the plants of such larger companies.

The record of the public hearing, the briefs filed prior to August 22, 1938, and, moreover, the Report of the Board setting forth its Findings, Conclusions and Recommendations are replete with statements of fact which show that such a determination as that recommended will be disastrous to many small producers, particularly those with plants in the East, whose services the Government has accepted in the past and needs now for the furtherance of its plans for national defense. As we have shown above, the Board's proposal of a determination to be followed by a further investigation of the position of the smaller companies will afford no practical relief. Apparently the Board has in mind an investigation of each small
193 producer in detail to determine whether what will amount, in effect, to a "locality" exemption would afford the remedy.

A reopening of the hearings would accomplish that purpose. The Board would then have an opportunity to examine the competitive situation of each of the small nonintegrated companies, the effect of its wage rate upon its ability to get business, whether such a change as recommended would be ruinous to it, and, most important of all, whether a strictly defined "locality" determination is not the answer to the problem. If the Board is to make a thorough study of the position of the small producer, it must investigate not only his wage rates but his economic position in the Industry and the effect upon such position of any recommendations that the Board shall make. As a matter of fact, an investigation along such lines should develop that many of the smaller companies are specialists making small materials in smaller lots, which of necessity require more labor. To do much of their work in the manner of the large producer would be like plowing a backyard with a tractor plow.

The Board having found that the effect upon the smaller companies warrants further consideration, it would seem to be not only reasonable, but imperative, to conclude such

an investigation and make the necessary findings before any report is made to the Secretary of Labor.

194 II.

The recommended further study of the effect of the lower rate in the South on the competition in the Industry must be made before any determination is promulgated.

Both the Record and the Board's Report show that, while there is a distinct wage differential between the North and the South, those producing localities in the North which naturally meet Southern competition have wage rates graded downward from the highest to strike an equitable balance with the competing area. The producing centers with the highest rates are those in the Pittsburgh, Chicago and Ohio districts. The rate pattern scales off in those districts which must ship southward, such as the St. Louis, Southern Illinois, Kentucky and Eastern areas. It is practically a matter worthy of judicial notice that iron and steel products are heavy and that a delivered cost must include a large proportion of freight charges.

As the Record shows, the cost of assembling raw materials in the South is generally lower than that in the St. Louis, Southern Illinois, Kentucky and Eastern areas because of the closer proximity of the Southern plants to their sources of supply of raw materials.

The largest producer in the South is already at a 45¢ per hour base rate for common labor. On the other hand a determination along the lines of the Board's rec-
195 ommendation would mean that the Eastern producer would be forced to increase all wage rates by at least 10%. The increase in manufacturing costs that would result from such an increase in wage rates would substantially restrict the territory in which he could successfully compete with the producers in the South. Furthermore such an increase in wage rates in the East would further impair the ability of the Eastern producers of iron and steel products to meet foreign competition.

The recommendation of the majority of the Board would, therefore, impair the ability of the small Eastern producer to compete with other steel producers not only in the North but in the South as well.

The Board recognizes, by its suggestion for further study of the effect of the recommended determination for the South, that some producers may be adversely affected thereby, and that it may seriously disturb normal competitive conditions in the Industry. In making that suggestion the Board indicates that it feels that its recommendation may not in fairness to small producers be generally applied. Our contention is that the recommendations of the majority of the Board are entirely incorrect; but, however that may be, by making such suggestion the Board admits that its work is unfinished. That being the case, then we most earnestly urge that now is the time to make the further investigation, not after the adoption of recommendations that will, as we believe, result in eliminating the small producer from competition, not only for Government work, but for business generally.

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A study of the wage determinations for other industries promulgated by the Secretary of Labor shows a number at 35c per hour, several at 40c per hour and only two at over 50c per hour for any Northern localities and in these two it is apparent that the determinations cover either skilled or semi-skilled labor. The Board's Report (p. 75) shows that less than 5% of the productive workers in the entire Steel Industry received wages based upon less than 50c per hour for common labor and more than 86% of such 5% are in the South. (Report, p. 78 et seq.) Considerably less than 1% of all of the productive workers in the Industry outside of the South received wages based upon less than 50c per hour for common labor. (Report, p. 78 et seq.) Obviously this is not a sweat shop industry and no real hardship on labor or need for any immediate changes has been shown.

The study of the effect of the proposed Southern rate cannot be confined to a possible change in that rate. The Board can find only the facts as they exist. As the minority Report states (p. 143), the Public Contracts Act is not a wage-raising Act as such. It must be true that at least one of the purposes of the contemplated study is to discover whether the increases recommended for other localities would materially disturb competitive conditions in the Industry not only as regards competition for Government contracts but also for all other busi-

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ness. It must include a study of freight charges and of the areas in which the South competes with the other producing areas, particularly the East, as well as the extent of specialization and integration in the various plants of the Industry.

But he who runs may read that an increase of at least 10% in the wage rates in the East and none to the outstanding producer in the South must affect the competitive position of the Eastern producers, particularly the small Eastern producers whose markets are in the East. The Board admits the need for further testimony and study of the facts in that regard. Simple equity and justice require that such studies be completed before any determination shall be made that will cause injury to the small Eastern producer whose wage rates conform to those generally prevailing in the locality of his plant.

III.

The Board has failed to obtain adequate evidence with regard to and to consider the effect of the proposed determination upon the wage rates in other industries.

It is apparent from the Record that the proposed determination recommended by the majority of the Board will effect an increase in the prevailing minimum wages in the Steel Industry in a great number of localities in
198 which the plants of the Industry are located. The Board has found that wage rates in the Industry generally are dependent on the base rate for common labor and that any increase in the latter rate must result in increases in the other wage rates in the Industry (Report, pp. 8, 9, 10). The Board has adopted as the definition of a common laborer (Report, p. 8) "one who performs physical or manual labor of a general character and simple nature, requiring no special training, judgment nor skill". Such type of labor is of course employed in most other industries. The Record shows that common labor is employed by manufacturing plants, railroads, public utilities, municipalities, state departments and by the United States Government itself. It is apparent that any increase in the common labor rate in the Steel Industry in any locality must affect other industries in which common labor is employed in such locality.

Any determination by the Secretary of Labor which should seriously disturb prevailing wage levels in industry generally, as we believe the proposed determination would do, would be clearly contrary to the purpose of the Act. It is submitted, therefore, that before the Secretary of Labor can properly make any determination with regard to prevailing minimum wages in the Steel Industry which will result in such widespread increases in the rates of pay for common labor now being paid in the Industry, the Board should obtain adequate evidence as to the effect of any such determination upon such other industries
199 and as to the wage rates prevailing in such other industries in the localities in which the plants of the Steel Industry are situated and the effect thereof upon wage rates in the Steel Industry.

The Public Contracts Act, in effect, requires that in determining prevailing minimum wages in any industry the Secretary of Labor shall have due regard for wages of persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the work is to be performed. An effort was made to include evidence on that subject before the Record was closed. The Record is not complete, however, because the Board made no attempt to elicit such information from other sources than the few who submitted it voluntarily. Neither did any governmental agency submit information on the subject.

A complete and reasonable recommendation can only be made after a thorough investigation of the common labor rates in all industries in the immediate vicinity of the iron and steel plants, and, moreover, it cannot be complete unless information is elicited direct from those industries to discover the effect upon them, the communities and upon industry at large.

It is submitted that the Board will not have made a sufficient investigation to enable it to make proper recommendations with respect to one of the large basic industries of the country, until such data are sought and placed upon the Record. The Board, being a fact finding agency,
200 will not have performed the duty conferred upon it unless, and until, it shall have investigated and considered such matters.

Wherefore, your petitioners respectfully request that this matter be resubmitted to the Public Contracts Board for the purpose of a further investigation and hearing with regard to the subjects hereinbefore referred to, and that the time within which interested parties may file exceptions and objections to the Findings of Fact, Conclusions and Recommendations contained in the Report of the Board and briefs in support thereof be extended for a period of fifteen days after a determination on this petition shall be made and notified to your petitioners.

Dated, December 3, 1938.

Respectfully submitted,

D. S. WOLCOTT,
J. H. PARKER, and
JOHN T. WHITING,
as a Committee representing small Eastern producers of Iron and Steel Products.

ROBERTS B. THOMAS, *Counsel,*
101 Park Avenue,
New York, N. Y.

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Exhibit D

Before The Secretary of Labor

In the Matter of THE DETERMINATION OF THE PREVAILING MINIMUM WAGES IN THE IRON AND STEEL INDUSTRY.

Exceptions of Small Eastern Producers of Iron and Steel Products to the Findings of Fact, Conclusions and Recommendations of the Public Contracts Board.

ROBERTS B. THOMAS,
Attorney for Committee representing small Eastern producers of Iron and Steel Products,
101 Park Avenue,
New York, N. Y.

202 Before The Secretary of Labor

In the Matter of The Determination of the Prevailing Minimum Wages in the Iron and Steel Industry.

Exceptions of Small Eastern Producers of Iron and Steel Products to the Findings of Fact, Conclusions and Recommendations of the Public Contracts Board.

D. S. Wolcott, J. H. Parker and John T. Whiting, as a Committee (hereinafter called the Committee) representing small Eastern producers of iron and steel products, on behalf of themselves, acting as such Committee, and on behalf of each of the companies represented by the Committee, except to the Findings of Fact, Conclusions and Recommendations (hereinafter called the Majority Report) of the Public Contracts Board (hereinafter called the Board) and to the proposed findings, conclusions and recommendations set forth in the Opinion of Minority attached to said Majority Report (hereinafter called the Minority Report), reserving, however, all rights and benefits in law and in equity and to any motions, objections and exceptions heretofore made or taken and appearing in the record herein or in any petitions, statements, briefs or other documents heretofore filed on behalf of the Committee, the group represented by the Committee, or by any of the companies represented by the Committee, as follows:

1. To the Majority Report and to the Minority Report in their entirety and to each of the conclusions and
203 recommendations and proposed conclusions and recommendations therein set forth on the ground that the findings of fact, conclusions and recommendations as well as the proposed findings of fact, conclusions and recommendations do not make proper application of the evidence herein under the provisions of the Public Contracts Act (Public No. 846, 74th Congress, June 30, 1936, hereinafter called the Act) nor in accordance with other applicable provisions of law.

2. To the recommendation set forth on page 136 of the Majority Report that the Secretary of Labor determine the prevailing minimum wages in the industry to be as follows:

"(1) 45 cents an hour within the area made up of the States of Louisiana, Arkansas, Mississippi, North Carolina, South Carolina, Florida, Oklahoma, Texas, Alabama, Tennessee, Georgia, and Virginia.

(2) 62.5 cents an hour within the area made up of the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, New Jersey, Maryland, Delaware, West Virginia, Kentucky, Ohio, Indiana, Michigan, Wisconsin, Illinois, Missouri, Iowa, Minnesota, North Dakota, South Dakota, Nebraska, Kansas, New Mexico, Colorado, Wyoming, Montana, Idaho, Utah, Arizona, Nevada, California, Oregon, Washington, and the District of Columbia."

on the ground that said recommendation is contrary to and against the weight of evidence and is contrary to the provisions of law applicable to such a determination, and on the further ground that there is no evidence to sup-
204 port any determination for any localities in the states of Louisiana, Arkansas, Mississippi, North Carolina, South Carolina, Florida, Texas, Tennessee, Georgia, Maine, New Hampshire, Vermont, Rhode Island, Wisconsin, Iowa, North Dakota, South Dakota, Nebraska, Kansas, New Mexico, Colorado, Wyoming, Montana, Idaho, Arizona, Nevada, Oregon and the District of Columbia.

3. To the recommendation set forth as follows on page 136 of the Majority Report:

"(2) that subsequent to a determination that the prevailing minimum wages in the Iron and Steel Industry are 45 cents in the South and 62.5 cents in the remainder of the industry, a study, and if necessary, further Findings of Fact be made with respect to the effect of the lower minimum wage on the competition in the industry for Government business;"

on the ground that such a recommendation can only be based upon a finding that the evidence in respect thereto is insufficient and is, therefore, contrary to the applicable provisions of law.

4. To the recommendation set forth as follows on page 136 of the Majority Report:

"(3) that subsequent to a wage determination for the Iron and Steel Industry, a study be made of the position of the smaller companies in the competition for Government business in order that the Board may be placed in a position to advise the Secretary of Labor with respect to requests for exemptions under section 6 of the Act, should the occasion arise;" on the ground that such recommendation for a further study subsequent to a determination, being based upon a finding that the evidence in respect thereto is insufficient, is contrary to all the equities and to any of the provisions of law applicable thereto.

5. To the finding of the definition of the products of the iron and steel industry as set forth on pages 5 and 6 of the Majority Report on the ground that it is contrary to and against the weight of evidence, and on the further ground that there is no evidence to support a finding that each and every of the products of the iron and steel industry as therein set forth are, or have been, the subject of Government purchases.

6. To the findings set forth on pages 12 to 23, both inclusive, of the Majority Report of rates in various plants under the heading "Base rate in plant having union agreement as reported by S. W. O. C." on the ground that there is insufficient evidence to support the same, and on the further ground that there is no evidence to the effect that the base rates as therein set forth have been arrived at under, or are set forth in, such agreements.

7. To the finding set forth as follows on page 91 of the Majority Report:

"None of the plants paying the 56.5 base rate is in any sense geographically isolated from other iron and steel plants. Distances in the Eastern area between these plants are relatively small. Syracuse is the farthest removed from important producing centers of any of the Eastern localities in which the 56.5 rate is paid. Newark, Ohio is somewhat removed from other Ohio-producing areas, but neither Syracuse nor Newark occupy separate geographical positions in the industry. The Laclede plants are located in the immediate vicinity of St. Louis, Missouri which is a small iron and steel-producing center." on the ground that such finding is contrary to and against the weight of evidence.

8. To the finding set forth on page 101 of the Majority Report as follows:

"The predominant minimum wage practice in this industry comes to light only when we view the practice of the industry as a whole or over broad regional areas."

on the ground that such finding is not supported by the evidence and is incompetent, irrelevant and immaterial under the provisions of law applicable in this proceeding.

9. To the finding on page 102 of the Majority Report to the effect that the Southern region is not divided into distinct areas of competition on the ground that there is not sufficient evidence in the Record to support such a finding, and that such finding is irrelevant and immaterial.

10. To the finding on page 102 of the Majority Report to the effect that the relative size and the large working force of the Tennessee Coal, Iron and Railroad Company put it in a position to be the determining factor in establishing the prevailing minimum wage for persons employed in the South, on the ground that such finding is contrary to and against the weight of evidence.

11. To the finding set forth on page 104 of the Majority Report as follows:

"Geographically the lower paying plants are, for
207 the most part, tied into the economy of producing areas in which higher rates are paid."

on the ground that there is insufficient evidence to support such finding and on the further ground that such a finding is irrelevant and immaterial.

12. To the finding on page 105 of the Majority Report that neither Erie, Pa., or Troy, N. Y. can be said to be distinct economic regions on the ground that there is no evidence in the Record to support such finding and on the further ground that such finding is irrelevant and immaterial.

13. To the findings on page 115 of the Majority Report to the effect that none of the producing centers in the vicinity of Erie, Harrisburg, Johnstown, Bethlehem and Philadelphia, Pa., Syracuse and Troy, N. Y., Baltimore and Sparrows Point, Md., and New England can be called geographic regions on the ground that such findings are contrary to and against the weight of evidence.

14. To the finding on page 119 of the Majority Report that geographic location does not limit the efforts of iron

and steel manufacturers to secure Government business, on the ground that there is not proper or sufficient evidence in the Record to support such finding.

15. To the finding set forth as follows on page 122 of the Majority Report:

"The evidence presented above gives us a picture of an economically unified industry. The geographical regions are not self-contained marketing areas, nor are the various producing centers. Between the Northern and Southern geographic regions the levels of base rates were
208 found to be so wide apart that a separate prevailing minimum wage was derived from a comparison of the base rates paid in the Southern plants. But there is nothing to parallel this situation in the industry as we look at it from East to West. The producing areas are small and especially in the Middle West and East there is a high degree of inter-competition. The West may be regarded as a geographic area but, as we have seen, there is no basic difference between the base rate level in the West and in the East. In the East a number of producing centers vary somewhat in the base rate which may be said to be predominant in these centers but, on the whole, the variations among them are not large. In only two instances in the East are the base rates in the producing centers on a substantially lower plane than in other producing centers in the same area. But in no case in the East, that is to say, the area from Chicago and St. Louis to and including New England do we find any variations on a regional basis. What we have for the most part is a goodly number of small geographic areas, among which there are variations in the base rates to a limited extent and among which there are no lines of economic demarcation. This, in brief, is the situation with respect to the geographic location of plants. We do not believe that the geographic location of the plants offers a sound basis for separate findings of prevailing minimum wages, except the geographic division that has been made between the North and the South."

on the ground that such finding is not supported by the evidence.

16. To the finding on page 122 of the Majority Report to the effect that Buffalo, N. Y. is not a separate economic area for wage purposes on the ground that such find-

209 ing is not supported by the evidence and on the further ground that such finding is irrelevant and immaterial.

17. To the conclusion set forth as follows on page 123 of the Majority Report:

"The recognition of the particular base rate levels in the considerable number of producing centers where they are a variable factor might be a satisfactory approach to the problem of minimum wages in the industry if the purpose of these proceedings was to perpetuate the local wage variations, as under the Code. But the purpose of these proceedings is to find the prevailing minimum wage which will serve the Government as an effective wage standard in its contract for iron and steel. It is necessary that the minimum wage standard for this purpose be as broad in its scope as possible. Both the requirements of the Government for a wage standard and the economic characteristics of the industry's markets require that a broad view of the entire wage structure of the industry in the North and West be taken, rather than a particular view of numerous local wage levels."

on the ground that such conclusion is contrary to the provisions of law applicable in this proceeding.

18. To the conclusion on page 124 of the Majority Report to the effect that it is necessary herein to consider the base rate structure of the industry as a whole on the ground that such conclusion is contrary to the provisions of law applicable in this proceeding.

19. To the proposed finding set forth on page 139 of the Minority Report to the effect that the producing centers at Johnstown, Pa. and Buffalo, N. Y. be included as a

210 wage locality with the Pittsburgh, Ohio, West Virginia, Indiana and Illinois producing areas, on the ground that such a finding is contrary to and against the weight of evidence.

20. To the proposed conclusion set forth as follows on page 141 of the Minority Report:

"* * * If a 6-cent differential is of sufficient magnitude to justify its recognition by a separate wage determination for the area in which it is found, as I think it is, what factors could be present to overcome the differential? Evidently they are (1) the competitive advantage presumably

inherent in the lower rate and (2) the danger to the higher wage structure lurking in this competitive advantage."
on the ground that such conclusion is contrary to the provisions and the intent of the provisions of law applicable in this proceeding.

The Committee on behalf of itself and of the companies represented by it also except to the aforesaid Findings of Fact, Conclusions and Recommendations of the Majority of the Board and of the proposed findings, conclusions and recommendations of the Minority in that the Board has failed:

21. To take evidence with respect to the specific products produced in each plant and in each producing center and to find the prevailing minimum wages for each and every of the iron and steel products which are the subject of this proceeding, and for each of the producing centers for each and every of such products.

22. To find the minimum prevailing wages for each producing center or locality as required by law.

23. To recommend that the Secretary of Labor de-
211 termine the prevailing minimum wages in the iron and steel industry in the localities hereinafter set forth under the heading "Producing Center" at the wage rates hereinafter set forth under the heading "cents per hour":

Producing center	cents per hour
Allentown, Pa.	56.5
Apollo, Pa.	53
Berwick, Pa.	48
Bethlehem, Pa.	56.5
Birdsboro, Pa.	54
Burnham, Pa.	49
Chester, Pa.	56.5
Coatesville, Pa.	56.5
Conshohocken, Pa.	56.5
Danville, Pa.	56.5
Erie, Pa.	53
Franklin, Pa.	50
Harrisburg, Pa.	54
Johnstown, Pa.	58.5

Producing center	cents per hour
Lebanon, Pa.	46.5
Milton, Pa.	46.5
Phoenixville, Pa.	56.5
Philadelphia, Pa.	50
Pine Forge, Pa.	43
Reading, Pa.	57
Sheridan, Pa.	48.5
Steelton, Pa.	56.5
Williamsport, Pa.	48.5
Holyoke, Mass.	55
Wareham, Mass.	49.5
Worcester, Mass.	55
Branford, Conn.	52.5
Bridgeport, Conn.	55
Wallingford, Conn.	50
Buffalo, N. Y.	59.5
Cohoes, N. Y.	42
Lockport, N. Y.	55
Lyon Mountain, N. Y.	30
Syracuse, N. Y.	56.5
Troy, N. Y.	46
Dover, N. J.	50
Harrison, N. J.	56.5
Jersey City, N. J.	56.5
Kenilworth, N. J.	57
Newark, N. J.	45
Baltimore, Md.	53
Claymont, Del.	57
Bristol, Va.	38
Lynchburg, Va.	42
Portsmouth, Va.	35
Reusens, Va.	43
Richmond, Va.	35
Roanoke, Va.	35

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24. To take testimony and make findings in accord with such testimony with respect to the rates paid unskilled, common labor in other industries in the various localities

in which the products of the iron and steel industry are produced.

Dated, December 17, 1938.

Respectfully submitted,

ROBERTS B. THOMAS,

Attorney for Committee representing small Eastern producers of Iron and Steel Products,

101 Park Avenue,
New York, N. Y.

213 *Exhibit E.*

U. S. DEPARTMENT OF LABOR (597)

Washington

TITLE 41—PUBLIC CONTRACTS

Division of Public Contracts

In the Matter of the Determination of the Prevailing Minimum Wages in the Iron and Steel Industry

This matter is before me pursuant to Section 1(b) of the Act of June 30, 1936 (49 Stat. 2036; 41 U. S. C. Sup. III 35) entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes", (hereinafter called the Act). The Public Contracts Board, created in accordance with Section 4 of the said Act by Administrative Order dated October 6, 1936, held a hearing on July 25, 1938 in the above-entitled matter.

Notice of this hearing was sent to all known members of the industry, to trade unions, to trade publications, and to trade associations in the field. Invitation to attend the hearing was extended through the national press to all other interested parties.

Appearances were made at the hearing by 39 members of the industry, of whom 20 offered testimony either in person or by representatives. Appearances were also made by the Amalgamated Association of Iron, Steel & Tin Workers of America, American Federation of Labor, Bricklayers

International Union, Committee for Industrial Organization, Machinery and Allied Products Institute, Steel Founders Society of America, Steel Plate Fabricators Association, and Steel Workers Organizing Committee. Testimony was given by American Federation of Labor and Steel Workers Organizing Committee.

Prior to, during and immediately after the hearing, letters, telegrams, and briefs containing wage data and other relevant information were received from 51 concerns who were not represented at the hearing. After the hearing a notice dated July 29, 1938 was sent to all known mem-
214 bers of the industry from whom no reports were received in response to the notice of hearing informing these parties that the record would be held open until August 8, 1938 for the submission of wage data and other information with respect to the prevailing minimum wages in the Iron and Steel Industry. Responses in the form of letters, telegrams and briefs were received from 61 of these parties. At the request of interested parties the time for filing briefs was extended until August 22, 1938.

The Board's report recommended that the industry be defined as in Article I, sections 3 and 4 of the Amendment to Code of Fair Competition for the Iron and Steel Industry, with the exception that it recommended the exclusion of tin plate, tin mill black plate, and terneplate for the reason that the government makes no purchases thereof and there is evidence of a wage scale existing in the production of these products different from that otherwise existing in the Iron and Steel Industry.

The Board further recommended that the Secretary of Labor find the minimum wage in the Iron and Steel Industry to be 45 cents an hour within the area made up of the States of Louisiana, Arkansas, Mississippi, North Carolina, South Carolina, Florida, Oklahoma, Texas, Alabama, Tennessee, Georgia, and Virginia; and 62.5 cents an hour within the area made up of the States of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, New Jersey, Maryland, Delaware, West Virginia, Kentucky, Ohio, Indiana, Michigan, Wisconsin, Illinois, Missouri, Iowa, Minnesota, North Dakota, South Dakota, Nebraska, Kansas, New Mexico, Colorado,

Wyoming, Montana, Idaho, Utah, Arizona, Nevada, California, Oregon, Washington, and the District of Columbia.

The Board further recommended that a study be made looking to the establishment of a minimum wage for the manufacture of tin plate, tin mill black plate, and ter-
215 neplate, and that after the determination of a minimum wage in the industry, further study be made to determine the effect of the determination on small companies. The Board likewise recommended that an allowance be made in the determination of this case for the employment of apprentices at wages less than the prevailing minimum wages, provided that the employer has on file an active indenture entered into in accordance with the standards of the Federal Committee on Apprenticeship.

The Administrator of Public Contracts circularized the Board's recommendations to all parties who had shown an interest in the matter in order that they might register their objections to or approval of them before any decision was made by the Secretary.

Numerous requests were received from members of the industry for an opportunity to present oral argument for or against the adoption of the Board's recommendations in whole or in part. Such objections as were made to the Board's report were not to the finding as to the wages actually being paid in the industry, but to the recommendation based on these wage facts that the prevailing minimum wage be found to be 45 cents in the South and 62.5 cents in the North. For these reasons, on December 20, 1938, opportunity was afforded to all interested parties to present oral arguments before me as Assistant Secretary of Labor acting for and in the stead of the Secretary. Forty-eight companies and two representatives of labor unions availed themselves of this opportunity to show cause.

As in the case of letters and briefs, the oral arguments did not challenge the Board's findings of wage facts, but made objection to the conclusions based thereon as to the prevailing minimum wages in the industry.

No objection has been made to the definition of the industry recommended by the Board, with the exception that the Machinery and Allied Products Institute requested that the definition be so worded as to exclude from its purview

the open hearth and electric furnaces used in that
216 industry. The definition as formulated describes the products of the Iron and Steel Industry and the provisions thereof do not apply to open hearth and electric furnaces which are utilized in any production other than that specifically enumerated. All of the objections which have been taken to the recommendations of the Board turn upon the construction to be placed upon the language of Section 1(b) of the Public Contracts Act.

It has been urged that the recommendations of the Board are contrary to the provisions of the Public Contracts Act because they do not take cognizance of existing wage differentials between the various municipalities in which the plants of the industry are located. It is also urged that the Board's recommendations fail to give proper recognition to the existing economic structure of the industry and have failed to recognize the existence of broad geographic differentials. It has also been objected that differentials based on populations should be recognized in the selection of the appropriate locality within which prevailing minimum wages are to be determined; and that differentials based upon the size of the plants should be recognized.

It is recognized that the problem of selecting the geographical boundaries of each "locality" within which prevailing minimum wages are to be determined by the Secretary of Labor is a difficult one upon which wide differences of opinion may reasonably be held.

On behalf of one group of objectors it has been urged that the term "locality" as used in the Act is in effect synonymous with "city, town, village or other civil subdivision of the state". In support of this contention, it is urged that the Act is but an extension of the principles of the Davis-Bacon law (Act of Aug. 30, 1935, 49 Stat. 1011); that since the unit within which prevailing minimum wages are to be determined under the Davis-Bacon law, is the city, town,
village or other civil subdivision of the state in which
217 the work is to be performed, Congress must have intended the same unit to be used for the determinations to be made under the Act.

While this position has been forcefully presented it is believed that it will not stand careful analysis. In the first place, in accordance with well-known canons of statutory construction, it may be assumed that had Congress intended

to so limit the unit for prevailing minimum wage determinations under the Act, it would have adopted the identical language of the Davis-Bacon law.

The Davis-Bacon law provides:

"That the advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works . . . and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the *city, town, village, or other civil subdivision of the state* in which the work is to be performed, . . . and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications . . .:" (italics supplied).

The comparable language of the Act provides:

"That in any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States . . . for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:

"(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by

the Secretary of Labor to be the prevailing minimum
218 wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating *in the locality* in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;" (italics supplied).

It will be seen that the language of the Act closely corresponds to the language of the Davis-Bacon law in certain respects. But in selecting the appropriate unit for the making of prevailing minimum wage determinations, Congress carefully avoided the use of the more narrowly restrictive language of "city, town, village or other civil subdivision of the state in which the work is to be performed" and adopted instead the more flexible word "locality". This significant departure from the language of the Davis-Bacon law in this particular respect indicates a Congressional intent to relax the rigid requirement of the Davis-Bacon law and to permit the Secretary to exercise a sound discretion in the selection of appropriate units for prevailing minimum wage determinations. Indeed, had Congress used in the Act the restrictive language which was entirely appropriate for the different type of problem dealt with by the Davis-Bacon law, it would in a large measure have defeated the very objectives which it sought to achieve.

The restricted unit of the "city, town, village or other civil subdivision of the state in which the work is to be performed" is appropriate in the case of construction contracts for government buildings or public works since the construction work must be performed at the site of construction. But such is not ordinarily the case with government supply contracts. Here the field is broad and suppliers widely separated geographically may and normally are in a position to and do compete for government supply contracts. The Iron and Steel Industry itself is a striking example. And, since in many instances, there will be found to be but one plant of a particular industry located
219 in any one city, town, village or other civil subdivision, the net effect of construing the word "locality" as used in the Act to mean "city, town, village or other civil subdivision" would be to predestine in most cases a finding

that the prevailing minimum wages are the minimum wages in fact being paid at each plant.

Furthermore, such an arbitrary and unwarranted construction of the language of the Act would produce administrative problems of an almost insuperable character. Under such a construction it would be necessary to make prevailing minimum wage findings for perhaps as many different municipalities as there are establishments of manufacturers or suppliers who might conceivably bid on each government supply contract. And this procedure would be required for every one of the many government supply contracts to be entered into. Effective administration of the Act would become almost impossible. In view of the fact that the Act sought to eliminate the competitive advantage enjoyed by bidders on government supply contracts as a result of subnormal wage practices, no argument is necessary to demonstrate that such a narrowly restrictive construction of the statutory language would operate to make the statute an empty gesture and the finding of prevailing minimum wages a wholly useless procedure.

It will also be observed that this narrowly restricted construction of the word "locality" as used in the Act is contrary to the administrative construction consistently adhered to by the Secretary of Labor in the administration of the Act. Reference to the determinations heretofore made in the administration of the Act will disclose a consistent approach to the problem of selection of ap-
220 propriate units for prevailing minimum wage determinations in the light of the facts of each particular industry. In no instance has the language been administratively construed to require differentials between each city, town, village, or other civil subdivision of a state. In several instances where the facts in respect of the particular industry indicated that regional influences were in fact present, regional groupings were made and prevailing minimum wages determined for each region. Although it has had opportunity to do so, Congress has not acted to alter this consistent administrative construction of the Act. Congress may be presumed to have acquiesced and agreed to this administrative construction by its failure to act to alter it.

If we adopt in the present case this customary approach it is important to examine the concept which industry has of itself. It is a matter of public knowledge that an industry so vastly ramified in its productive and marketing operations as iron and steel does not regard itself as subdivided in a multiplicity of small localities, but as concentrated around a few well defined centers. For example, Mr. Myron Taylor in his report to the Annual Meeting of stockholders of the United States Steel Corporation on April 4, 1938, emphasized this when he said, Page 11: "It was determined, after a great deal of study, that the Corporation could achieve its highest efficiency by grouping its main producing units in the Pittsburgh district, the Chicago district and the Birmingham district. The Corporation had no adequate access to the Pacific Coast and so in 1930 the
221 assets of the Columbia Steel Corporation were acquired for common stock, thus giving the Corporation a producing unit in every major market."

Other objections were based upon the failure of the Board to give consideration to differences in population and differences in the size of the various plants in selecting each locality. But these objections likewise appear to be without merit, since the Act makes no provision for the establishment of population differentials or differentials according to size of plant.

The word "locality" used in the statute carries obvious geographic connotations. But, as has been pointed out in some of the briefs, the term may indicate "2. The fact of being local in the sense of belonging to a particular spot"; or "4(b). A place or district of undefined extent considered as the site occupied by certain persons or things, or as the scene of certain activities". (A New English Dictionary on Historical Principles; Oxford, Clarendon Press, 1908; Vol. VI, (p. 380.)

222 The language of the statute does not itself suggest answers to the questions which it raises. Other factors than geography must be adduced to assist the determination. Undoubtedly the Board was correct in considering the economic facts of the industry itself to assist it to a conclusion. The only question is whether the Board gave proper weight to the geographic factor and to other relevant considerations. In the light of all the evidence, I am

disposed to the view that the recommendations of the Board should not be adopted in full because for the present purposes those recommendations do not give sufficient weight to some of the relevant factors, and consequently fail to recognize the existence of all localities indicated by the evidence in the record.

The Board has recommended a finding that the states of Louisiana, Arkansas, Mississippi, North Carolina, South Carolina, Florida, Oklahoma, Texas, Alabama, Tennessee, Georgia and Virginia constitute a locality within the meaning of the Act and that the prevailing minimum wage in such locality is 45 cents an hour. On the whole, this recommendation appears to be amply supported by the evidence in the record. This southern area historically constitutes a well-defined geographical area and the pattern of currently prevailing wages in this area, as shown by the evidence in the record, supports the conclusion that the entire group of southern states should be treated as one locality for the purposes of the present proceeding. However, it would appear that the State of West Virginia, except for the panhandle area, comprising the counties of Harrison, Hancock, Brooke, Ohio, Monongalia, and Marshall, should likewise be included within the locality of the other southern states. The State of West Virginia, except for the panhandle area, is closely allied with the South and there seems no reason for excluding it from the southern locality. The evidence indicates that the only production in the State of West Virginia outside the panhandle area is predominantly for the southern market where its competition lies and this area is understood to be outside the Pittsburgh market area. With the addition of that portion of the State of West Virginia, exclusive of the counties of Hancock, Brooke, Ohio, Harrison, Monongalia, and Marshall, the recommendations of the Board with respect to the southern locality and the recommendation of a finding that a prevailing minimum wage in that locality is 45 cents an hour will be adopted.

223

The recommendations of the Board that the remaining states of the country should be found to constitute one locality for the purposes of the present determination do not, in my opinion, properly recognize certain geographic and economic factors in the industry as fully as they should.

224 The coastal states of Washington, Oregon and California seem to constitute a fairly well-defined geographical locality. The evidence reveals that the principal producing centers are found in the State of California where there are shown to be nine plants. There is one small plant in Oregon and three plants in Washington, one of which is not in operation. The geographic position of these states more or less isolates them from competition by land from the East, and the plants in these states compete for and serve a more or less well-defined local market.

There is wage data of record for five plants in California and one in Washington. Plants not reporting have a small production capacity. The minimum wage in three plants, employing 3,130 employees, is 60 cents per hour. The minimum wage in one plant, employing 90 employees, is 65 cents per hour, and the minimum wage in two plants, employing 1,495 employees, is 58 cents per hour.

The more or less well-defined wage pattern disclosed by the data in the record supports the conclusion that geographically and economically these three states should be found to constitute a locality for the purposes of the present determination and that the prevailing minimum wage in the locality is 60 cents per hour.

Proceeding eastward geographic considerations suggest the inclusion of the mountain states of Montana, Idaho, Nevada, Wyoming, New Mexico, Utah, Colorado, and Arizona within a single locality. There are only two producing plants in this area, and the principal plant enjoys a certain economic isolation by virtue of the fact that no water transportation is available. This plant, located approximately 1,000 miles west of Chicago, is shown to sell approximately three-quarters of its output within a radius of 600 miles.

Both of the plants located within this locality pay a minimum of 60 cents per hour. Again a combination of economic and geographic considerations leads to the conclusion that the above-named states may properly be
225 regarded as a separate locality for the present purposes and that the prevailing minimum wage of the locality is 60 cents.

The remaining states east of the mountain states and west of the Mississippi River, consisting of the states of

North Dakota, South Dakota, Kansas, Nebraska, Minnesota, Iowa and Missouri have producing centers in Minnesota, Iowa and Missouri. There are two plants in Minnesota, one small plant in Iowa and a concentration of seven plants in Missouri. There are three additional plants in Alton, Madison, and Granite City, Illinois which are separated from St. Louis, Missouri by the Mississippi River and for all practical purposes are a part of the St. Louis producing center. It is characteristic of most of the producing points in this group of states that they are midway between the great producing centers in the North and the East and the great producing center of the South in Birmingham. Historically the plants in this area have operated on a wage differential below the rate paid in the northern and eastern centers, but higher than the rates paid in the South. The record contains wage data for six of the ten plants included in these states, including all of the principal producing centers. The minimum wages being paid in and about St. Louis, Missouri vary from 55 cents per hour to 58½ cents per hour. Two thousand eighty nine employees are employed in one plant paying a minimum of 58½ cents per hour, while 825 are employed in two plants paying a minimum of 56½ cents per hour and 2,160 employees are employed in two plants paying a minimum of 55 cents per hour. The record indicates that one plant in Minnesota employs 1,303 employees and pays a minimum wage of 60 cents per hour. The composite wage pattern for this area clearly discloses a differential under the northern and eastern plants and above the southern plants.

In view of all the factors involved, it is my opinion that the states under discussion, together with Alton, Madison, and Granite City, Illinois should be found to constitute a locality within the meaning of the Act, and upon the basis of the wage data just discussed, a finding of a prevailing minimum wage of 58½ cents per hour will be made.

226 The area immediately to the east of the trans-Mississippi locality is dominated by the producing centers in and about Chicago and Gary, Indiana. The states of Wisconsin, Illinois (except Alton, Madison and Granite City which are a part of the Saint Louis industrial area) Michigan, and Indiana seem to constitute a fairly well-de-

fined locality, both in terms of geography and in the light of the concentration of production.

The record contains wage data from 31 plants of the 82 in the locality. Twelve plants employing 47,545 employees pay a minimum of 62½ cents; 13 plants employing 5,647 employees pay a minimum of from 38 to 62½ cents; 3 plants employing 5,376 employees pay a minimum of from 63 to 70 cents. The prevailing minimum wage in this locality is obviously 62½ cents an hour.

The remaining states consisting of Pennsylvania, Delaware, Maryland, Kentucky, Ohio, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire and Maine, together with the panhandle area of West Virginia, consisting of the counties of Hancock, Brooke, Ohio, Harrison, Monongalia and Marshall, fall within the great market dominated by Pittsburgh. It has been urged both at the hearing before the Board and in the subsequent proceedings in this matter that the western portion of the state of Pennsylvania does not fall within the same locality as the eastern portion of the state and a finding of various different localities has been urged. Yet the entire eastern market, frequently referred to in the industry as the Pittsburgh district, would seem to constitute a single locality, both in terms of geography and in terms of the markets predominantly served by the producing plants.

227 Historically, the plants in the eastern states have sold their products largely on the so-called Pittsburgh basing point system. While counsel commented on the recent abandonment of the system, none of the evidence in the record would indicate that the comparatively recent change has as yet had any significant economic repercussions or has in any way altered the essential outlines of the Pittsburgh locality.

The record contains wage data with respect to 157 of the 268 plants in the area. The reporting plants employ 220,653 employees. Eighty-six of the plants, employing 154,707 employees, pay a minimum of 62½ cents an hour. The first point of substantial concentration of employees is at 56½ cents. At that rate there are 16 plants employing 36,743 employees. Thirty-eight plants employing 12,029 employees pay less than 56 cents. Between the rates

of 56½ and 62½ cents, there are 16 mills employing 16,673 employees. One plant employing 501 employees pays 63½ cents. Clearly the minimum is 62½ cents.

It has been urged at the hearing that in some instances the establishment of a 62½ cent wage will operate inequitably as to those plants which are now paying less, particularly with relation to those plants in the Pittsburgh locality which are paying 56½ cents, and it has also been urged that a further study of the industry be made before the wage determination be promulgated. The evidence as recited above, however, for each district, indicates clearly the prevalence of the prevailing minimum wage in that area and is sufficient basis upon which to promulgate a wage generally applicable throughout the industry.

It was argued by counsel that if the regional lines which the majority of the Board recommended were adopted or if lines were established other than by municipal sub-
228 division as contemplated in the Davis-Bacon law, hardship would be created upon some of the small companies in some regions. It was also suggested, although the point was not developed in the evidence, that while the small companies depend upon government business only to a minor degree certain kinds of steel specialties essential to the Government are chiefly furnished by small companies. If this is indeed the case an analysis will be made of the bidding in future contracts for specialties so that the machinery provided by Section 6 may be called into operation upon a proper showing that the public interest would thereby be served.

There was also a suggestion that the small companies perform the bulk of work on experimental contracts. Since experimental contracts are not within the scope of this decision, it would appear that the procurement of commodities obtained in this way will not be impaired.

It is noted that there exists in the industry a practice whereby the employees of the industry pay, through the instrumentality of the employer's disbursing office, certain obligations. It is suggested that the practice exists for the convenience of the employee in paying the obligations. Whether or not such practice contravenes the provisions of Section 1(b) of the Act is a matter of course that can be decided only upon full disclosure of all facts involved.

Where there exists at the plant of any bidder on Government contracts subject to the provisions of the Public Contracts Act a practice of so using its disbursing office for the convenience of its employees, and where this practice has been in existence at the plant for a long continued period of time, the bidder should submit a full statement of the facts to the Administrator of the Division of Public Contracts for a determination as to whether or not
229 they contravene provisions of Section 1(b) of the Act.

Upon all the evidence submitted in this matter, including the briefs filed and the oral arguments,

I Hereby Determine

(1) That the iron and steel industry is defined to mean and include the business of producing and selling all or any one or more of the following products:

Axels—rolled or forged
Bale ties—single loop
Bars—alloy steel, hot rolled
Bars—cold finished, carbon and alloy
Bars—concrete reinforcing, straight lengths
Bars, ingots, blooms and billets—iron
Bars—merchant steel
Bars—tool steel
Ferre—manganese and spiegeleisen
Girder rails and splice bars therefor
Ingots, blooms, billets and slabs—alloy
Ingots, blooms, billets and slabs—carbon
Light rails—60 pounds or less per yard—and splice bars and angle bars therefor
Standard tee rails of more than 60 pounds per yard—and angle bars and rail joints therefor, or any of such products
Mechanical tubing
Pig iron—foundry, high silicon silvery, malleable, open hearth basic, Bessemer and high silicon Bessemer
Pig iron—low phosphorus
Pipe—standard, line pipe and oil country tubular products
Plates
Posts—fence and sign

Railroad-tie plates
Railroad track spikes
Sheet bars
Sheets
Skelp
Steel sheet piling
Strip steel—cold rolled
Strip steel—hot rolled
Structural shapes
Tubes—boiler
Tube rounds
Wheels—car, rolled steel
Wire—drawn
Wire hoops—twisted or welded
Wire nails and staples, twisted barbless wire, barbed wire, twisted wire fence stays and wire fencing (except chain-link fencing)
Wire rods
Wire—spring
Wire—telephone

230 (2) That the prevailing minimum wages for persons employed in the manufacture or furnishing of he products of the Iron and Steel Industry are the amounts ndicated for each of the following localities whether arived at on a time or piece work basis:

1. 45 cents per hour in the locality consisting of the states f Louisiana, Arkansas, Mississippi, North Carolina, South Carolina, Florida, Oklahoma, Texas, Alabama, Tennessee, Georgia, Virginia and West Virginia (except the counties f Hancock, Brooke, Ohio, Harrison, Monongalia, and Marhall);

2. 60 cents per hour in the locality consisting of the states f Washington, Oregon and California;

3. 60 cents per hour in the locality consisting of the states f Montana, Idaho, Nevada, Wyoming, New Mexico, Utah, Colorado and Arizona;

4. 58½ cents per hour in the locality consisting of the tates of North Dakota, South Dakota, Nebraska, Kansas, Minnesota, Iowa, Missouri and the area in and about East Saint Louis, Illinois;

5. 62½ cents per hour in the locality consisting of the States of Wisconsin, Illinois, (except the area in and about East Saint Louis, Illinois), Michigan, and Indiana;

6. 62½ cents per hour in the locality consisting of Ohio, Pennsylvania, Delaware, Maryland, Kentucky, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, and Maine, and that portion
231 of the State of West Virginia comprised within the counties of Hancock, Brooke, Ohio, Marshall, Harrison, and Monongalia, and the District of Columbia;

Provided that apprentices may be employed at lower rates if their employment conforms to the standards of the Federal Committee on Apprenticeship.

This determination shall be effective and the minimum wages hereby established for the respective localities shall apply to all contracts awarded subject to Public Act No. 846, 74th Congress, on or after January 31, 1939.

Dates this 16th day of January, 1939.

(signed) CHARLES V. McLAUGHLIN
Acting Secretary

232 *Exhibit F* (623)

U. S. DEPARTMENT OF LABOR

Washington

TITLE 41—PUBLIC CONTRACTS

Division of Public Contracts

In the Matter of the Determination of the Prevailing Minimum Wages in the Iron and Steel Industry

Postponement of Effective Date of Secretary of Labor's Decision in the Iron and Steel Industry.

The effective date of my decision in the above-entitled matter is hereby postponed until March 1, 1939 in order that industry may make necessary adjustments to comply with the decision.

Dated: January 30, 1939

C. V. McLAUGHLIN
Acting Secretary of Labor

Base Rates for Common Labor†

EASTERN DISTRICT

Base Rates	Location of Plant	Employer	Number of Wage Earners	Number of Common Laborers
30	Lyon Mtn., N. Y.	Chateaugay Ir. & St. Co.	103	18
42	Cohoes, N. Y.	Cohoes Rolling Mill Co.	163	9
43	Pine Forge, Pa.	Pine Iron Works Co.	52	19
46	Troy, N. Y.	Burden Iron Co.	300	69
46½	Lebanon, Pa.	Wrought Iron Co.	663	154
46½	Milton, Pa.	Milton Manufacturing Co.	345	6
48	Berwick, Pa.	American Car & Fdry. Co.	135	24
48½	Syracuse, N. Y.	Eckels, Nye Steel Co.	80	16
48½	Sheridan, Pa.	E. J. Lavino & Co.	180	95
48½	Williamsport, Pa.	Sweets Steel Co.	263	99
49	Burnham, Pa.	Logan Iron & Steel Co.	165	38
49½	Wareham, Mass.	Tremont Nail Co.	63	13
50	Parkersburg, W. Va.	Parkersburg Iron & St. Co.	588	99
50	Philadelphia, Pa.	Henry Disston & Sons Co.*	310	30
50	Troy, N. Y.	Troy Furnace Corp.	196	37
50	Dover, N. J.	Ulster Iron Works	250	35
50	Wallingford, Conn.	Wallingford Steel Co.	—	—
50	Worcester, Mass.	Worcester Pressed St. Co.	100	17
52	Huntington, W. Va.	West Virginia Rail Co.	274	53
52	Troy, N. Y.	Poor & Co.	132	24
52½	Branford, Conn.	Atlantic Wire Co.	130	13
53	Baltimore, Md.	Eastern Rolling Mill Co.*	446	78
54	Birdsboro, Pa.	E. & G. Brooke Iron Co.	215	47
54	Harrisburg, Pa.	Central Iron & Steel Co.	1,210	138
54	Harrisburg, Pa.	Harrisburg Steel Corporation	779	85
54	Baltimore, Md.	Rustless Iron & Steel Co.	247	80
55	Bridgeport, Conn.	American Tube & Stamp Co.	639	50
55	Worcester, Mass.	Johnson Steel & Wire Co.	273	50
57	Holyoke, Mass.	G. W. Prentiss & Co.	150	15
58	Philadelphia, Pa.	Carnegie-Illinois Steel Corp.*	93	20
58	Morgantown, W. Va.	Carnegie-Illinois Steel Co.*	13	12
58½	Pittsburgh, Pa.	American Steel & Wire Co.*	918	93
58½	Bethlehem, Pa.	Bethlehem Steel Co.	8,342	891
58½	Lebanon, Pa.	Bethlehem Steel Co.	664	129
58½	Steelton, Pa.	Bethlehem Steel Co.	3,198	384
56½	Danville, Pa.	Bethlehem Steel Co.	243	52
56½	Williamsport, Pa.	Bethlehem Steel Co.	434	130
56½	Coatesville, Pa.	Bethlehem Steel Co.	325	44
56½	Coatesville, Pa.	Lukens Steel Co.*	1,640	230
56½	Chester, Pa.	South Chester Tube Company**	614	113
56½	Conshohocken, Pa.	Alan Wood Steel Company*	1,379	255
56½	Phoenixville, Pa.	Phoenix Iron Co.	1,200	58
56½	Sparrows Pt., Md.	Bethlehem Steel Co.	15,846	1,477
56½	Harrison, N. J.	Crucible Steel Corp.*	1,580	300
56½	Jersey City, N. J.	Crucible Steel Corp.*	335	18
56½	Syracuse, N. Y.	Crucible Steel Corp.*	1,103	54
56½	Syracuse, N. Y.	Crucible Steel Corp.*	533	229
57	Kenilworth, N. J.	Carpenter Steel Co.	45	0
57	Reading, Pa.	Carpenter Steel Co.	834	56
57	Philadelphia, Pa.	Midvale Steel Co.	2,075	48
57	Claymont, Del.	Worth Steel Co.	876	66
57	Bridgeport, Conn.	Heppenstall Co.*	175	24
58	Worcester, Mass.	G. F. Wright St. & Wire Co.	171	18
59½	Philadelphia, Pa.	Ellwood Ivins St. Tube Wks.	24	5
62½	Trenton, N. J.	American Steel & Wire Co.*	323	9
62½	New Haven, Conn.	American Steel & Wire Co.*	460	8
62½	Worcester, Mass.	American Steel & Wire Co.*	2,819	98
		Total	54,393	5,541

†NOTE: The wage data set forth in this Exhibit G have been compiled from the table appearing on pages 12 to 23, inclusive, of the Report of the Public Contracts Board referred to in the Complaint to which this Exhibit is attached, excluding, however, those plants for which wage data were not included in the table on page 75 of

48½	[illegible]	[illegible]	[illegible]	[illegible]
49	Burnham, Pa.	Logan Iron & Steel Co.	165	38
49½	Wareham, Mass.	Tremont Nail Co.	63	13
50	Parkersburg, W. Va.	Parkersburg Iron & St. Co.	588	99
50	Philadelphia, Pa.	Henry Disston & Sons Co.*	310	30
50	Troy, N. Y.	Troy Furnace Corp.	196	37
50	Dover, N. J.	Ulster Iron Works	250	35
50	Wallingford, Conn.	Wallingford Steel Co.	—	—
50	Worcester, Mass.	Worcester Pressed St. Co.	100	17
52	Huntington, W. Va.	West Virginia Rail Co.	274	53
52	Troy, N. Y.	Poor & Co.	132	24
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55	Bridgeport, Conn.	American Tube & Stamp Co.	639	56
55	Worcester, Mass.	Johnson Steel & Wire Co.	273	50
55	Holyoke, Mass.	G. W. Prentiss & Co.	150	15
56	[illegible]	[illegible]	[illegible]	[illegible]
56	[illegible]	[illegible]	[illegible]	[illegible]
56	[illegible]	[illegible]	[illegible]	[illegible]
56½	[illegible]	[illegible]	[illegible]	[illegible]
56½	[illegible]	[illegible]	[illegible]	[illegible]
56½	[illegible]	[illegible]	[illegible]	[illegible]
56½	Danville, Pa.	Bethlehem Steel Co.	243	52
56½	Williamsport, Pa.	Bethlehem Steel Co.	434	130
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56½	Jersey City, N. J.	Crucible Steel Corp.*	335	18
56½	Syracuse, N. Y.	Crucible Steel Corp.*	1,103	54
56½	Syracuse, N. Y.	Crucible Steel Corp.*	553	229
57	Kenilworth, N. J.	Carpenter Steel Co.	45	0
57	Reading, Pa.	Carpenter Steel Co.	834	56
57	Philadelphia, Pa.	Midvale Steel Co.	2,075	48
57	Claymont, Del.	Worth Steel Co.	876	66
57	Bridgeport, Conn.	Heppenstall Co.*	175	24
58	Worcester, Mass.	G. F. Wright St. & Wire Co.	171	18
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62½	Worcester, Mass.	American Steel & Wire Co.*	2,819	98
		Total	54,393	5,541

†NOTE: The wage data set forth in this Exhibit G have been compiled from the table appearing on pages 12 to 23, inclusive, of the Report of the Public Contracts Board referred to in the Complaint to which this Exhibit is attached, excluding, however, those plants for which wage data were not included in the table on page 75 of said Report apparently for the reason that such plants were not within the definition of the Iron and Steel Industry that was recommended by said Board. In some cases it has not been possible to reconcile the number of plants shown in such tables with the wage data in the Record referred to in said Complaint, but in each such case the figures appearing in said Report have been used for the purposes of this Exhibit. For a description of the respective Districts referred to in this Exhibit G see paragraph 52 of said Complaint.

*NOTE: An asterisk after the name of a company indicates that the Report referred to in the preceding note shows that such company has an agreement with the Steel Workers Organizing Committee.

**NOTE: The Report referred to in the second preceding note shows that this company has an agreement with the Amalgamated Association of Iron, Steel and Tin Workers of North America.

EXHIBIT G—SHEET No. 1.

Base Rates for Common Labor†

BUFFALO DISTRICT

Base Rates	Location of Plant	Employer	Number of Wage Earners	Number of Common Laborers
59½	Tonawanda, N. Y.	Buffalo Steel Co.	178	110
53	Erie, Pa.	Erie Forge Co.	241	3
53	Erie, Pa.	Erie Forge & Steel Co.	625	9
55	Lockport, N. Y.	Simonds Saw & Steel Co.	398	49
59½	Lackawanna, N. Y.	Bethlehem Steel Co.	6,853	603
59½	Buffalo, N. Y.	Hanna F. Corp.	395	45
59½	Buffalo, N. Y.	Republic Steel Corp.	1,338	59
59½	N. Tonawanda, N. Y.	Tonawanda Iron Corp.	25	8
60	N. Tonawanda, N. Y.	Buffalo Bolt Co.	856	101
		Total	10,879	982

JOHNSTOWN DISTRICT

Base Rates	Location of Plant	Employer	Number of Wage Earners	Number of Common Laborers
58½	Johnstown, Pa.	Bethlehem Steel Co.	7,649	515
58½	Johnstown, Pa.	Carnegie-Illinois Steel Corp.*	1,247	88
		Total	8,896	603

† See Note † on Sheet No. 1.
* See Note * on Sheet No. 1.

Base Rates for Common Labor†

WESTERN DISTRICT

Base Rates	Location of Plant	Employer	Number of Wage Earners	Number of Common Laborers
50	Franklin, Pa.	Franklin Steel Works	212	15
51	Marion, O.	Pollak Steel Co.	335	23
53	Apollo, Pa.	Apollo Steel Co.	1,000	60
55	Canton, O.	Superior Sheet Steel Co.*	700	14
56	Newport, Ky.	Andrews Steel Co.*	2,500	650
56¼	Jackson, O.	Globe Iron Co. —	102	25
56½	Newark, O.	Buckeye Rolling Mill Co.	53	23
58½	Cambridge, O.	Carnegie-Illinois Steel Corp.*	30	17
60	Monaca, Pa.	Pittsburgh Tube Co.	193	2
60½	Dover, O.	Reeves Steel & Mfg. Co.	750	20
62½	Columbus, O.	American Rolling Mill Co.		
62½	Middletown, O.	" " " "		
62½	Zanesville, O.	" " " "	8,809	337
62½	Ashland, Ky.	" " " "		
62½	Butler, Pa.	" " " "		
62½	Cleveland, O.	American Steel & Wire Co.*	3,328	69
62½	Donora, Pa.	" " " "	2,804	134
62½	Rankin, Pa.	" " " "	326	16
62½	Braeburn, Pa.	Braeburn Alloy Steel Co.*	160	16
62½	Bessemer, Pa.	Carnegie-Illinois Steel Corp.*	1,767	113
62½	Canton, O.	" " " "	216	28
62½	Clairton, Pa.	" " " "	4,143	331
62½	Duquesne, Pa.	" " " "	4,105	81
62½	Etna, Pa.	" " " "	266	37
62½	Farrell, Pa.	" " " "	3,304	146
62½	Irvin, Pa.	" " " "	1,116	92
62½	McKeesport, Pa.	" " " "	411	16
62½	Martins Ferry, O.	" " " "	1,473	78
[illegible]	[illegible]	" " " "	[illegible]	[illegible]
[illegible]	[illegible]	" " " "	[illegible]	[illegible]
[illegible]	[illegible]	" " " "	[illegible]	[illegible]
[illegible]	[illegible]	" " " "	[illegible]	[illegible]
[illegible]	[illegible]	" " " "	[illegible]	[illegible]
[illegible]	[illegible]	Firth Sterling Steel Corp.*	[illegible]	[illegible]
62½	Youngstown, O.	Fitzsimmons Co.	72	22
62½	Pittsburgh, Pa.	Crucible Steel Corp.*	1,447	211
62½	Pittsburgh, Pa.	" " "	609	139
62½	Pittsburgh, Pa.	" " "	68	44
62½	Pittsburgh, Pa.	" " "	2,199	153
62½	Pittsburgh, Pa.	" " "	23	2
62½	Washington, Pa.	Jessop Steel Co.*		
62½	Aliquippa, Pa.	Jones & Laughlin Steel Corp.*	9,247	573
62½	Pittsburgh, Pa.	" " " "	6,843	1,313
62½	LaTrobe, Pa.	LaTrobe Elec. Steel Co.*	529	39
62½	Washington, Pa.	Molybdenum Corp.	74	15
62½	Lorain, O.	National Tube Co.*	7,456	17
62½	Ellwood City, Pa.	" " "	2,394	0
62½	McKeesport, Pa.	" " "	3,334	1
62½	Pittsburgh, Pa.	Pittsburgh Steel Co.*	5,189	430
62½	Canton, O.	Republic Steel Corp.		
62½	Massillon, O.	" " "	4,131	114
62½	Cleveland, O.	" " "	2,218	252
62½	Niles, O.	" " "		
62½	Warren, O.	" " "	5,163	281
62½	Youngstown, O.	" " "	5,825	269
62½	Pittsburgh, Pa.	" " "	181	14
62½	Lowellville, O.	Sharon Steel Corp.*		
62½	Youngstown, O.	" " "	1,786	196
62½	Sharon, Pa.	" " "		
62½	Canton, O.	Timken Steel & Tube Co.*		
62½	Gambrinus, O.	" " " "	—	—
62½	Wooster, O.	" " " "		
62½	Steubenville, O.	Weirton Steel Co.	1,015	186
62½	Weirton, W. Va.	" " "	8,060	1,136
62½	4 in Ohio	Wheeling Steel Corp.*	13,727	1,546
62½	2 in W. Va.	" " "	3,132	671

[illegible]	[illegible]	" " " "		
62½	Butler, Pa.	" " " "		
62½	Cleveland, O.	American Steel & Wire Co.*	3,328	69
62½	Donora, Pa.	" " " "	2,804	134
62½	Rankin, Pa.	" " " "	386	16
62½	Braeburn, Pa.	Braeburn Alloy Steel Co.*	160	16
62½	Bessemer, Pa.	Carnegie-Illinois Steel Corp.*	1,767	113
62½	Canton, O.	" " " "	216	28
62½	Clairton, Pa.	" " " "	4,143	331
62½	Duquesne, Pa.	" " " "	4,105	81
62½	Etna, Pa.	" " " "	266	37
62½	Farrell, Pa.	" " " "	3,304	146
62½	Irvin, Pa.	" " " "	1,116	92
62½	McKeesport, Pa.	" " " "	411	16
62½	Martins Ferry, O.	" " " "	1,473	78
[illegible]	[illegible]	" " " "	[illegible]	[illegible]
[illegible]	[illegible]	" " " "	[illegible]	[illegible]
[illegible]	[illegible]	" " " "	[illegible]	[illegible]
[illegible]	[illegible]	" " " "	[illegible]	[illegible]
[illegible]	[illegible]	" " " "	[illegible]	[illegible]
[illegible]	[illegible]	Firth Sterling Steel Corp.*	[illegible]	[illegible]
62½	Youngstown, O.	Fitzsimmons C.	72	22
62½	Pittsburgh, Pa.	Crucible Steel Corp.*	1,447	211
62½	Pittsburgh, Pa.	" " "	609	139
62½	Pittsburgh, Pa.	" " "	68	44
62½	Pittsburgh, Pa.	" " "	2,199	153
62½	Pittsburgh, Pa.	" " "	23	2
62½	Washington, Pa.	Jessop Steel Co.*		
62½	Aliquippa, Pa.	Jones & Laughlin Steel Corp.*	9,247	573
62½	Pittsburgh, Pa.	" " " "	6,843	1,313
62½	LaTrobe, Pa.	LaTrobe Elec. Steel Co.*	529	39
62½	Washington, Pa.	Molybdenum Corp.	74	15
62½	Lorain, O.	National Tube Co.*	7,456	17
62½	Ellwood City, Pa.	" " "	2,394	0
62½	McKeesport, Pa.	" " "	3,334	1
62½	Pittsburgh, Pa.	Pittsburgh Steel Co.*	5,189	430
62½	Canton, O.	Republic Steel Corp.		
62½	Massillon, O.	" " "	4,131	114
62½	Cleveland, O.	" " "	2,218	252
62½	Niles, O.	" " "		
62½	Warren, O.	" " "	5,163	281
62½	Youngstown, O.	" " "	5,825	289
62½	Pittsburgh, Pa.	" " "	181	14
62½	Lowellville, O.	Sharon Steel Corp.*		
62½	Youngstown, O.	" " "	1,786	196
62½	Sharon, Pa.	" " "		
62½	Canton, O.	Timken Steel & Tube Co.*		
62½	Gambrinus, O.	" " " "	—	—
62½	Wooster, O.	" " " "		
62½	Steubenville, O.	Weirton Steel Co.	1,015	186
62½	Weirton, W. Va.	" " "	8,080	1,136
62½	4 in Ohio	Wheeling Steel Corp.*	13,727	1,546
62½	2 in W. Va.	" " "	3,132	671
62½	Youngstown, O.	Youngstown Sheet & Tube Co.	9,806	349
62½	Pittsburgh, Pa.	Heppenstall Co.*	501	43
		Total	155,755	11,483

† See Note† on Sheet No. 1.
* See Note* on Sheet No. 1.

EXHIBIT G—SHEET No. 3.

236 Filed February 27, 1939

* * *

Motion for Preliminary Injunction

Now come Lukens Steel Company, a corporation, Alan Wood Steel Company, a corporation, South Chester Tube Company, a corporation, Central Iron & Steel Company, a corporation, Harrisburg Steel Corporation, a corporation,
The Eastern Rolling Mill Company, a corporation,
237 and The Atlantic Wire Company, a corporation, the plaintiffs in the above-entitled action, by and through their attorneys, and move this Honorable Court upon their verified Complaint and the affidavits of J. A. Downey, Francis J. Tucker, Henry S. Evans, Marjorie Wilford, Darwin S. Wolcott, John W. Logan and Wilbert Wear, filed herein the 25th day of February, 1939, that this Court grant and issue a preliminary injunction:

(a) enjoining and restraining, pending final determination of this cause, defendants Frances Perkins, Charles V. McLaughlin and L. Metcalfe Walling, and each of them, individually and in their respective official capacities, their and each of their officers, agents, assistants, employees, representatives and attorneys, and any one associated with or acting in concert or participation with them or any of them, and their successors in office, and each of them, and their officers, agents, assistants, employees, representatives and attorneys, and any one associated with or acting in concert or participation with them or any of them, and each of them, from causing or permitting to become effective, and from promulgating, publishing or holding out, or causing or permitting to be promulgated, published or held out, as effective or valid or authorized by law, the purported Determination of prevailing minimum wages in the Iron and
Steel Industry issued under date of January 16, 1939,
238 signed by the defendant Charles V. McLaughlin, as Acting Secretary of Labor, and entitled "In the Matter of the Determination of Prevailing Minimum Wages in the Iron and Steel Industry" (hereinafter called the Determination); and

(b) enjoining and restraining, pending final determination of this cause, defendants Henry Morganthau, Jr., Christian Joy Peoples, Claude Augustus Swanson, Harry

Hines Woodring, Harold L. Ickes and James A. Farley, and each of them, individually and in their respective official capacities, their and each of their officers, agents, assistants, employees, representatives and attorneys, and any one associated with or acting in concert or participation with them, or any of them, and their successors in office, and each of them, and their officers, agents, assistants, employees, representatives and attorneys, and any one associated with or acting in concert or participation with them or any of them, and each of them, from (i) inserting or causing or requiring or permitting to be inserted in any invitation to bid on any public contract, or in any advertisement for bids on any such contract or in the specifications for any such contract, or in any bid on any such contract, or in any required form for any such bid, or in any such contract, any stipulation or representation that any person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles or equipment used in the performance of the contract will be paid, without subsequent
239 deduction or rebate on any account, or otherwise, not less than the minimum wages set forth in the Determination, or any stipulation or representation of like purport or effect, and (ii) inserting or causing or requiring or permitting to be inserted in any invitation to bid on any public contract for the manufacture or furnishing of any iron or steel product or any product of the Iron and Steel Industry (as defined in the Determination), or in any advertisement for bids on any such contract, or in the specifications for any such contract, or in any bid on any such contract, or in any required form for any such bid, or in any such contract, the following stipulation or representation:

"All persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles or equipment are to be manufactured or furnished

under the contract; *Provided, however,* That this stipulation with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor."

or any stipulation or representation of like purport or effect.

The grounds of this motion are:

(1) the Determination is plainly contrary to, and not authorized by, the Act of Congress approved June 30, 1936 (Public—No. 846—74th Congress; 49 Stat. 2036-2039, c. 881);

240 (2) the Determination is arbitrary and capricious;

(3) the Determination is unsupported by any evidence;

(4) the Determination is not supported by a preponderance of the evidence, as required by the above-mentioned Act;

(5) the Determination was not based upon the fair and impartial hearing required by the above-mentioned Act;

(6) Article 1(b) of Regulations No. 504 prescribed by the Secretary of Labor under the above-mentioned Act (Series A) is plainly contrary to, and not authorized by said Act, and is arbitrary and capricious and void, in so far as it purports to apply to contracts awarded pursuant to invitations for bids issued prior to the effective date of the Determination;

(7) the ruling by defendants Perkins, McLaughlin and Walling that the Determination applies to contracts awarded pursuant to invitations for bids issued prior to the effective date of the Determination is contrary to Article 1101 of such Regulations, arbitrary and capricious and void;

(8) the plaintiffs will suffer immediate and irreparable injury, for which they have no adequate remedy at law, if the preliminary injunction sought herein is not granted; and

(9) the plaintiffs, under all the circumstances presented, are entitled to invoke the aid of this Honorable Court to protect their legal rights from invasion by the defen-

241 dants.

Wherefore, plaintiffs pray that a preliminary injunction as above and as prayed in the Complaint be granted and issued by this Honorable Court.

O. MAX GARDNER,
Office & P. O. Address:
Woodward Building,
Washington, D. C.

ROBERTS B. THOMAS,
Office & P. O. Address:
101 Park Avenue,
New York, N. Y.

GARDNER, MORRISON & ROGERS,
Office & P. O. Address:
Woodward Building,
Washington, D. C.

WEBSTER & GARSIDE,
Office & P. O. Address:
15 Broad Street,
New York, N. Y.

HAUSE, EVANS, STOREY & LICK,
Office & P. O. Address:
Telegraph Building,
Harrisburg, Pa.

COOK & MARKELL,
Office & P. O. Address:
First National Bank Building,
Baltimore, Maryland.

GEORGE WALTER WITNEY,
Office & P. O. Address:
Finance Building,
Philadelphia, Pa.

Attorneys for Plaintiffs.

242 Filed February 25, 1939.

Affidavits of Darwin S. Wolcott, John W. Logan, Francis J. Tucker, Henry S. Evans, Wilbert Wear, J. A. Downey and Marjorie Wilford in Support of Preliminary Injunction.

243 STATE OF NEW YORK,
County of New York, ss:

Darwin S. Wolcott, being duly sworn, upon his oath deposes and says:

244 I am the Vice-President of Lukens Steel Company (hereinafter called the Company), a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania. The Company is engaged in the production and sale of certain products of the Iron and Steel Industry, as hereinafter more fully set forth. Its principal office is at Coatesville, in the County of Chester in said Commonwealth, where it also owns and operates a plant consisting of open hearth furnaces, four sheared plate mills, universal mill and flanging department, with an annual capacity of 350,000 tons of sheared plates and 85,000 tons of universal plates and 25,000 tons of rolled blooms and billets. The principal products manufactured and sold by the Company are sheared plates, universal plates and flanged and dished heads. Coatesville is approximately 38 miles from Philadelphia, Pennsylvania, and approximately 312 miles from Pittsburgh, Pennsylvania. The Company is one of the smaller companies in the Iron and Steel Industry.

At its above-mentioned plant, the Company employs at the present time approximately 2,000 wage earners, of whom approximately 125 are common laborers, paid at the rate of 56-½ cents an hour. Substantially all the other wage earners employed by the Company at such plant are paid at rates of pay in excess of such rate of pay for common labor. The Company is a party to an agreement with the Steel Workers Organizing Commitee by and under which a minimum basic hourly earning of 56-½ cents is prescribed and paid. The common labor wage rate paid by the Company is aforesaid is the same as that paid by the only other iron and steel company located in Coatesville.

The common labor wage rate paid by the Company as aforesaid is equal to or higher than that paid by all other industries located in Coatesville. The common labor rate paid in the Company's plant is 6 cents lower than the
245 62-½ cent rate paid by the integrated companies in the Pittsburgh area. A basic wage rate at a similar differential less than that generally prevailing in iron and steel works in Pittsburgh has prevailed in our plant and in other iron and steel plants in its immediate vicinity continuously for upwards of 50 years.

The Company has sold iron and steel products to various agencies of the Government of the United States for many years and desires to continue to bid on Government contracts for such products in the future. The aggregate amounts of the gross sales prices of iron and steel products sold by the Company to agencies of the United States during the years 1937 and 1938 were $107,750 and $277,749, respectively. The agencies of the United States to which the Company sold iron and steel products in such years were the Department of the Navy, including the Bureau of Supplies and Accounts and various Navy yards, and the Department of War. All told, the Company entered into 14 contracts with Government agencies during such years and submitted bids pursuant to many other invitations. The principal products furnished to agencies of the United States pursuant to such contracts were plates. The Company presently has on its books four uncompleted contracts with the Department of the Navy, including its bureaus. The sales price of the iron and steel products to be furnished under such contracts is approximately $100,000. Such contracts also cover plates.

Invitations to bid on a proposed contract with the Bureau of Supplies and Accounts of the Department of the Navy, Schedule No. 5681, for steel plates, sheets and strips, were recently issued. The bids upon such contract are to be opened on March 2, 1939. The invitation for bids on
246 such contract sets forth the determination dated January 16, 1939, of Charles V. McLaughlin, as Acting Secretary of Labor, with respect to prevailing minimum wages in the Iron and Steel Industry, and bidders are, in effect, required to agree to pay the minimum wages set forth in said Determination. The Company desires to bid on such contract.

I have been the Chairman of a Committee of small iron and steel producers, organized in connection with the proceeding in the United States Department of Labor entitled "In the Matter of the Determination of the Prevailing Minimum Wages in the Iron and Steel Industry". As such I have followed the course of such proceedings in detail, am familiar with the above-mentioned Determination dated January 16, 1939, of Charles V. McLaughlin, and have considered its effect upon the Company as well as other small iron and steel producers.

It is my belief that if such Determination is permitted to become effective, the competitive position of the Company, both in bidding on Government contracts and in carrying on private business will be substantially impaired. Increase of the common labor wage rate payable by the Company in the performance of Government contracts will, as a practical matter, necessarily result in an increase of other wage rates paid on such contracts as well as a corresponding increase on common labor rates and other wage rates in business with parties other than the Government. Whereas the cost of production of the large integrated companies in the Pittsburgh and Chicago areas, as well as the largest integrated company carrying on operations in Bir-
247 mingham, Alabama, will not be increased by the Determination, that of the Company will be increased approximately 10%, in so far as labor costs are concerned. As above stated, it is, therefore, quite plain that the Company will be severely penalized if the Determination becomes effective.

DARWIN S. WOLCOTT

Subscribed and sworn to before me this 23rd day of February, 1939.

(Notarial Seal)

SYLVIA A. SHAUGHNESSY.
Notary Public

SYLVIA A. SHAUGHNESSY
Notary Public, Queens County.
Queens Co. Clerk's No. 1849,
Reg. No. 1023 N. Y. Co. Clk's
No. 250, Reg. No. O-S-198

Commission expires March 30, 1940

248 STATE OF NEW YORK,
County of New York, ss:

John W. Logan, being duly sworn, upon his oath deposes and says:

249 I am the Secretary and Treasurer of Alan Wood Steel Company (hereinafter called the Company), a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania. The Company is engaged in the production and sale of certain products of the iron and steel industry. Its main office is located at Conshohocken, in the County of Montgomery, in the Commonwealth of Pennsylvania.

The Company owns and operates a plant at Ivy Rock, in said County, which has an annual capacity of 660,000 tons of steel ingots, 130,000 tons of sheared plates and 234,100 tons of rolled blooms and billets; a plant at Conshohocken, in said County, which has an annual capacity of 108,000 tons of hot and cold rolled sheets; and a plant at Swedeland, in said County, which has an annual capacity of 406,080 gross tons of pig iron.

The above-mentioned plants are located approximately 15 miles from Philadelphia, Pennsylvania, and approximately 340 miles from Pittsburgh, Pennsylvania.

At its above-mentioned plants the Company employs at the present time approximately 1,500 wage earners, of whom approximately 225 are common laborers, paid at the rate of 56-½c an hour, which is the base rate of pay of the Company for common labor. Substantially all the other wage earners employed by the Company at such plants are paid at rates of pay in excess of such base rate of pay for common labor, which rates are, in most instances, computed by adding various differentials to such base rate. The Company is a party to an agreement with the Steel Workers Organizing Committee and said base rate of pay

250 for common labor of 56-½ cents an hour is paid pursuant to said agreement.

I am familiar with the Determination, dated January 16, 1939, of Charles V. McLaughlin, as Acting Secretary of Labor, purporting to determine the prevailing minimum wages for persons employed in the manufacture or furnishing of the products of the iron and steel industry, as defined

therein. I have been engaged in the iron and steel business for a period of 35 years and am generally familiar with competitive conditions in the industry. On the basis of the consideration which I have given to the problem created by the purported determination of prevailing minimum wages at 62-½ cents in the locality in which the plants of the Company are situated, particularly when viewed in the light of the fact that the large fully integrated companies in the Pittsburgh area are in general currently paying that minimum wage rate, it is my belief that the competitive position of the Company, both in competition for Government business and in competition for private business, will be substantially impaired if said Determination is permitted to become effective.

The Company has done business with the Government of the United States for many years and desires to continue to bid on Government contracts in the future. The amounts of the gross sales of iron and steel products made by the Company to agencies of the United States in the years 1937 and 1938 were approximately $134,000 and $185,400, respectively.

The agencies of the United States to which the
251 Company sold iron and steel products in such years included the Department of the Navy, including the Bureau of Supplies and Accounts, Washington, D. C., the Boston Navy Yard, the Charleston Navy Yard, the Mare Island Navy Yard, the Norfolk, Virginia, Navy Yard, the Philadelphia Navy Yard and the Washington Navy Yard; the Department of War, including the Watertown, Massachusetts, Arsenal and the Rock Island Arsenal; the Department of Agriculture, Soil Conservation Service, Safford, Arizona; and the Department of Interior, Bureau of Reclamation, Denver, Colorado.

The principal products sold to such agencies of the United States, as aforesaid, were steel sheets and plates.

During the years 1937 and 1938 the Company submitted bids to the following agencies of the United States on contracts which were not obtained by the Company:

Department of the Navy
New York Navy Yard
Boston Navy Yard

U. S. Naval Academy
Portsmouth, N. H. Navy Yard
Norfolk Navy Yard
Mare Island Navy Yard
Philadelphia Navy Yard
Bureau of Supplies and Accounts
Washington, D. C. Navy Yard
Brownfield, Va. Aircraft

Department of War
Watertown Arsenal
Rock Island Arsenal

Department of Agriculture

All told, during the years 1937 and 1938 the Company bid on a total of 310 Government contracts.

The Company regularly receives invitations to bid from agencies of the United States on contracts for prod-
252 ucts of the iron and steel industry. The principal products covered by such invitations are pig iron, steel sheets, steel plates and special alloy steel.

At the present time, the Company has on its books unfilled orders under Government contracts which have been awarded to it, as follows:

Contract	Agency	Value
#65156	Bureau of Supplies & Accounts	$47,306.80
64320	" " " " " (Shipped) ($19,744.14)	85,000.00
#64932	" " " " "	70,576.45
#N151s-30277	Philadelphia Navy Yard	1,430.34
#N151s-30236	" " "	438.25
#N171s-45232	Washington Navy Yard	1,925.12
#N156s-14487	Phila. Naval Aircraft Factory	777.56
	Purchase orders on which performance has not yet been completed:	
Req-9X-4424	Boston Navy Yard	287.32
P. O. 4151	Watertown (Mass.) Arsenal	744.61
		$208,486.45

Invitations to bid have been issued on a proposed contract, Schedule No. 5681, by the Bureau of Supplies and Accounts of the Department of the Navy, for approximately 7,375 tons of steel plates, sheets and strip. The Company desires to bid on approximately 7,000 tons of such iron and steel products. The bids on said invitation are to be opened on March 2, 1939. Under the terms of the invitation to bid,

the above-mentioned Determination, dated January 16, 1939, of Charles V. McLaughlin, as Acting Secretary of Labor, has been called to the attention of all bidders and all bidders must agree to pay the minimum wages specified therein. The Company will not bid on such contract if such Determination is permitted to become effective on
253 March 1, 1939, and apply to the performance of such contract.

JOHN W. LOGAN

Subscribed and sworn to before me this 23rd day of February, 1939.

JOSEPHINE GREGORY SHELFO
Notary Public.

Notary Public
Kings County Clk's No. 990,
Reg. No. 9294 N. Y. County
Clk's No. 541, Reg. No. 9S515.
Queens County Clk's No. 1702,
Reg. No. 6633

Commission expires March 30, 1939

254 COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss:

Francis J. Tucker, being duly sworn, upon his oath deposes and says:

I am Treasurer of South Chester Tube Company, a
255 Pennsylvania corporation, with main office and plant at Chester, Commonwealth of Pennsylvania. The South Chester Tube Company (hereinafter called the Company) owns and operates at Chester, in the County of Delaware, in the said Commonwealth, a plant which has an annual capacity of 85,000 gross tons of wrought iron and steel pipe.

The Company is one of the smaller companies in the Iron and Steel Industry. The par value of the outstanding shares of its capital stock is $1,000,000.

At its above-mentioned plant, the Company employs at the present time approximately 560 productive workers, of whom approximately 100 are common laborers, paid at the rate of 56-½ cents an hour, which is the base rate of pay

of the Company for common labor. All the other wage earners employed by the Company at such plant are paid at rates of pay in excess of such base rates paid for common labor.

In the years 1937 and 1938 the Company sold pipe to the United States Navy Department and the Department of Agriculture. During such years, the Company also submitted a number of bids on which it did not obtain contracts to the War Department, the Bureau of Insular Affairs and the Navy Department.

The Company receives regularly from the Navy Department invitations to bid on purchases of pipe. Such invitations to bid are sent to the Company with considerable frequency.

The Company's plant is located about 15 miles southwest of Philadelphia.

As a result of investigation by conversations over the telephone with responsible executives of companies
256 investigated and through a wage analysis prepared by the Chamber of Commerce of Delaware County, Pennsylvania, I am informed and verily believe that the following are the minimum wage rates for common labor paid by the 25 leading industrial, utility and railroad concerns operating in the City of Chester, Pennsylvania:

Industry	*Minimum wage rate for common labor*
Chemical	49
	58
	55
Light manufacturing and miscellaneous	50
	55
	50
Oil	58*
	63*
	58*
Paper	60
Steel, castings and fabricating	40
	53
	56
	60

*36-hour week computed on 40-hour basis.

Industry	*Minimum wage rate for common labor*
Textiles	63
	44
Railroad	46
	48
City of Chester	50
Utility	52
	40

The common labor base rate of 56-½ cents an hour paid by the Company as aforesaid is paid pursuant to a contract with Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge No. 184, dated April 6, 1938. Said contract, provides, among other things, as follows:

257 "WAGES—The present basic wage scale established by the Company March 16, 1937, shall remain in force so long as this Agreement shall remain in effect, provided, however, should there be any general increase or decrease in the basic wage scales in the Steel Industry in the district in which the Company is located, the Company will change its basic wage scale to conform therewith."

The main reasons for the differential in the common labor base rate paid by the Company of 56-½ cents per hour and the common labor wage rate of 62-½ cents per hour paid by the large integrated companies with plants located at Pittsburgh is that the Company is at a disadvantage in its location at Chester, Pennsylvania in the transportation of raw materials, supplies and equipment from their point of production to the Company's plant. Under my supervision I have had made computations with respect to the supplies and materials purchased by the Company consisting of skelp; unfinished pipe and tubes, couplings, gas coal; pipe balls, sand, pipe coating, furnace brick, wire, machinery and china; and have determined that for an average year's operations of the Company, the added cost of transporting such supplies and materials to Chester is approximately $133,369.03 more than it would be if the Company's plant was located at Pittsburgh. This average annual extra cost of freight at Chester is by no means totally offset by the difference in the costs of labor at Chester and Philadelphia.

There have also been made under my supervision estimates of the cost to the Company during the same average year of an increase in the common labor rate of 6 cents per hour and a comparable increase of the wage rates of other productive workers which would, as a practical matter, become necessary if common labor rates were increased by such amount. To the best of my knowledge and belief,
258 such an increase would cost the Company approximately $100,000 per annum, which, when added to the additional cost for the transportation of materials and supplies because of the location of the plant and the Company at a distance from their source, the Company would be placed at a most decided disadvantage in competing for work in its usual markets, including Government work.

Although it is, of course, difficult to estimate what the effect upon the Company of the Secretary's determination, if sustained, would be, the provision above quoted of the Company's contract with the Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge No. 184, is of peculiar significance. Presumably, if other steel companies in the same "district" met the requirements of the Secretary's determination, the Company would be obligated under its contract to increase its common labor base rate.

FRANCIS J. TUCKER

Sworn to before me this 24 day of February, 1939.

REGINA L. HOEY
Notary Public

My Commission Expires Feb. 14, 1941

(Notarial Seal)

259 STATE OF NEW YORK,
County of New York, ss:

Henry S. Evans, being duly sworn, upon his oath deposes and says:

I am Vice-President of Central Iron & Steel Com-
260 pany, a Pennsylvania corporation, with main office and plant at Harrisburg, Pennsylvania. The Central Iron & Steel Company (hereinafter called the Company) owns and operates at Harrisburg in the County of Dauphin

Commonwealth of Pennsylvania, a plant which has an annual capacity of approximately 200,000 tons of sheared plates and sheets; universal plates and rolled blooms and billets for forging purposes.

The Company is one of the smaller companies in the Iron and Steel Industry. The par value of the outstanding shares of its capital stock is $2,245,400.00.

At its above-mentioned plant the Company employs at the present time approximately 1,200 wage earners, of whom approximately 150 are common laborers paid at the rate of 54 cents an hour, which is the base rate of the Company for all its labor.

The Company has had contractual relationship with the United States Government for upward of 20 years and for only short periods during that time has it been without a Government contract in progress. The amount of its Government work has been substantial and for the last 10 years has averaged about 8% of its tonnage. The products manufactured or furnished to the Government consist of plates, slabs and sheets and the Government agencies with which the Company has made contracts include the Navy Department, the War Department and the Panama Canal Administration.

During 1937 and 1938 the Company submitted bids in respect of contracts not obtained to the Navy Department, the War Department and the Panama Canal Administration. During 1937 and 1938 the number of such bids
261 was substantial. At the present time the Company has several contracts on which performance has not yet been completed, amounting in the gross to a substantial amount. These are principally with the Navy Department. As a practical matter, if the Company obtained a Government contract requiring payment of wages in accordance with the Determination dated January 16, 1939, of Charles V. McLaughlin, as Acting Secretary of Labor, with respect to prevailing minimum wages in the Iron and Steel Industry, all Government contracts now in progress would have to be completed at the new wage rate.

The Company is now in receipt of invitations to bid for two Government contracts to be awarded after March 1, 1939. These are for an aggregate of approximately 7,500 tons of plates for the Navy Department and Panama Canal

Administration. These invitations to bid each contain a requirement that the wages as determined by the Acting Secretary of Labor shall be paid.

In recent years the Company has built extensions and additions to its mill and inspection shed facilities for the purpose of more efficiently handling its Government business at a total expense of approximately $40,000.

The Company regularly, for several years, has received invitations to bid from the Navy Department, the War Department and the Panama Canal Administration for its products, consisting of plates, slabs and sheets.

The Company's only plant is located at Harrisburg, Pennsylvania, at which at the present time it employs approximately 1,200 wage earners of which approximately 150 are common laborers. It pays a common labor rate of 54 cents per hour. Said common labor rate is the same as that paid by the other steel plant in the same City.
262 There is one other steel plant in the adjoining municipality at which a common labor rate of 56-½ cents per hour is paid. The Company's said common labor rate is well above the average of the minimum wages for common laborers in other industries and the railroads in the City of Harrisburg.

The Company is not integrated. It does not own or control any ore, iron ore or metallurgical coal. It does not operate any blast-furnaces. It buys all its raw materials and converts them into steel. Its degree of mechanization and efficiency are comparable to other small steel plants making the same types of product. But because the Company is a small non-integrated plant, its natural markets are in the East and along the Atlantic seaboard.

In the vicinity of its plant, the Company is compelled to compete for its labor supply with machine shops, building construction, the Highway Department of the State of Pennsylvania and with large railroad car building and repair shops located in the Harrisburg district.

If the Company were required to comply with the above-mentioned determination of the Acting Secretary of Labor, it would be driven out of competition for Government contracts.

HENRY S. EVANS

Subscribed and sworn to before me this 23rd day of February, 1939.

WM. J. MILLER Notary Public
WM. J. MILLER *Notary* Public
Clk. 180 New York County
Reg. 0M104 Commission Mar.
30, 1940 Expires

Notarial Seal)

63 STATE OF NEW YORK,
County of New York, ss:

Wilbert Wear, first being duly sworn, deposes and says:

I reside in the City of Harrisburg, County of Dauphin, Commonwealth of Pennsylvania.

I am president and treasurer of Harrisburg Steel Corporation, a Pennsylvania corporation having its principal office and plant in the City of Harrisburg, County of Dauphin, Commonwealth of Pennsylvania. Said Harrisburg Steel Corporation was incorporated under the laws of the Commonwealth of Pennsylvania December 28, 1899.

The Corporation is one of the smaller companies in the steel industry and manufactures steel products and steel specialty products. Among such products are steel billets, slabs, coils, couplings, cylinders, flanges, liquefiers and munitions. It has an annual capacity of 77,500 ingot tons.

For upwards of twenty years the Corporation has entered into and performed contracts with the United States Government and Departments thereof with respect to the sale of steel products. As of the date hereof, it is duly licensed by the Department of State of the United States Government to manufacture and sell munitions. Its relations with the United States Government and all Departments thereof have at all times been and are satisfactory.

During the calendar year 1937 the Corporation sold to the United States Government or to Departments thereof products aggregating in value $184,807.65. During the calendar year 1938 products so sold aggregated in value
64 $71,436.19. Its aggregate sales for all purposes during the years 1937 and 1938 were respectively $4,687,-
92.43 and $1,926,950.77.

The products so manufactured and sold to the United States Government or Departments thereof during the calendar years 1937 and 1938 were high pressure gas cylinders, steel flanges and aerial bombs. The Departments of the United States Government to which said products were sold were the following: the Department of Agriculture, the Department of Commerce, the Department of the Interior, the Navy Department and the War Department.

During the calendar years 1937 the Corporation unsuccessfully bid with respect to contracts for which invitations to bid were issued by Picatinny Arsenal, the National Bureau of Standards, the Bureau of Supplies and Accounts and the Navy Department. During the calendar year 1938 the Corporation unsuccessfully bid with respect to contracts for which invitations to bid were issued by Charleston Navy Yard, Brooklyn Navy Yard, Bureau of Supplies and Accounts of the Navy Department, the National Bureau of Standards for the Helium Plant at Amarillo, Texas, the Chemical Warfare Service, the Edgewood Arsenal at Edgewood, Maryland, the Panama Canal Administration and the Picatinny Arsenal.

265 During the calendar year 1937 it was the successful bidder with respect to 10 contracts and during the calendar year 1938 it was the successful bidder with respect to 23 contracts, whereas the Corporation was an unsuccessful bidder on 5 occasions during the calendar year 1937 and on 9 occasions during the calendar year 1938. As of the date hereof there are no Government contracts on which the Corporation has not completed performance.

The Corporation desires to continue to bid on Government contracts.

The Corporation maintains one plant only, the same being located at Harrisburg, Pennsylvania. The average number of employees of the Corporation during the calendar year 1938 was 815. The Corporation pays its common labor 54 cents per hour. This rate of 54 cents per hour is identical with that paid by other steel plants situated in the City of Harrisburg. The wage rate of 54 cents per hour for common labor is, however, substantially above the average of wages paid for common labor in all other industries situated in the City of Harrisburg. The prevailing wage rate per hour for common labor in all other in-

dustries in the City of Harrisburg is 40 cents and 45 cents.

The Corporation is self-contained from open hearth to finished product. It is, however, not in any sense an integrated company and is required to purchase its pig iron and other raw materials from others.

266 Deponent believes that his Corporation could not successfully bid for Government contracts if required to pay the common labor wage rate of 62-½ cents per hour; that the Corporation burdened with such a wage rate for common labor could not compete with the larger companies having greater capital, modern machinery, and increased efficiency realized through completely integrated units; and that said larger companies would be uniformly successful in underbidding the smaller companies of which Harrisburg Steel Corporation is one.

During the calendar year 1938 while the Corporation suffered a loss in its operations, such loss would have been substantially greater if the common labor wage rate had been fixed at 62-½ cents per hour.

That in the opinion of deponent if the Determination of the Secretary of Labor is permitted to stand it must inevitably result in the placing of an intolerable burden upon the small non-integrated steel companies and tend to destroy competition not only with respect to Government contracts but with respect to business generally.

WILBERT WEAR

Sworn to before me this 23rd day of February, 1939.

KATHRYN ROTHWELL *Notary Public*, Queens County Queens Co. Clk's No. 2539, Reg. No. 1815 N. Y. Co. Clk's No. 246, Reg. No. OR159

Commission Expires March 30, 1940

(Notarial Seal)

267 STATE OF NEW YORK,
County of New York, ss:

J. A. Downey, being duly sworn, upon his oath deposes and says:

I am the President of the The Eastern Rolling Mill Company (hereinafter called the Company), which is a Maryland corporation.

The Company is a non-integrated manufacturer of
268 black, galvanized and stainless steel sheets. The Company purchases its raw material in the form of sheet bars and converts such raw material into sheets for sale by the Company.

The Company owns and operates one plant, which is situated in Colgate, Baltimore County, Maryland, immediately outside of the limits of the City of Baltimore, Maryland. The annual capacity of such plant is approximately 90,000 net tons of sheets.

The Company has made sales to various Government agencies over a period of years. In the year 1937 the gross amount of the Company's sales to Government agencies was $27,070.83. In the year 1938 the gross amount of the Company's sales to Government agencies was $3,346.01.

The Company regularly receives invitations to bid from the United States Navy Department, and the Company's sales have been almost entirely to that Department.

The Company employs approximately 500 wage earners at its above-mentioned plant, of whom approximately 80 are paid at the base rate of the Company for common labor, which base rate is 53 cents an hour. The Company has for about two years been a party to an agreement with the Steel Workers Organizing Committee, and such base rate of 53 cents an hour is paid in accordance with that agreement.

If the Company were required to raise its base rate for common labor from 53 cents an hour to 62-½ cents an hour and other rates as necessitated thereby in order to bid on Government contracts, I believe that there is grave danger that the Company would be forced out of competition for Government contracts.

If the base rate of the Company for common labor
269 had been 62-½ cents per hour in 1937 and 1938, and the wage rates of the Company for other classes of labor had been approximately 18% higher than they actually were in such years, and other expenses of the Company and the sales prices of the Company's products had remained the same, the operations of the Company in 1937

actually would have resulted in a loss instead of a profit of about $121,000, and the loss in 1938 would have been approximately $100,000 greater.

The Company does not have any apprentices, learners or handicapped workers or any other class of labor which is paid less than the base rate of the Company for common labor.

J. A. DOWNEY

Subscribed and sworn to before me this 23rd day of February, 1939.

SYLVIA A. SHAUGHNESSY
Notary Public, Queens County
Queens Co. Clerk's No. 1849,
Reg. No. 1023 N. Y. Co. Clk's
No. 250, Reg. No. O-S-198

Commission expires March 30, 1940

(Notarial Seal)

270 STATE OF NEW YORK,
County of New York, ss:

Marjorie Wilford, being duly sworn, upon her oath deposes and says:

I am the Treasurer of The Atlantic Wire Company (hereinafter called the Company), a corporation duly organized and existing under the laws of the State of Connecticut.

271 The company is a non-integrated producer of plain wire. The Company buys its raw material in the form of hot rolled steel rods and draws such rods into wire for sale by the Company. The annual capacity of such mill is approximately 22,000 tons of plain wire and 500 tons of galvanized wire.

The Company owns and operates one plant, a wire mill, which is situated in Branford, Connecticut.

The Company is a very small company. The par value of the outstanding shares of its common stock is $25,000.

At its above-mentioned plant the Company employs approximately 150 wage earners, of whom approximately 15 are paid at the base rate of the Company for common labor, which base rate is 52-½ cents per hour. All the other wage

earners employed by the Company are paid at rates of pay in excess of such base rate of pay for common labor, which rates are generally computed by adding various differentials to such base rate.

I am aware that large appropriations have been made by Congress and I understand that more large appropriations are contemplated, pursuant to which large purchases of iron and steel products will be made by various Government agencies, and, in my opinion, the Company will desire from time to time to bid on Government contracts for wire.

I am familiar with the determination of prevailing minimum wages in the iron and steel industry issued under date of January 1, 1939, by Charles V. McLaughlin as Acting Secretary of Labor. If the Company, in order to bid on Government contracts, will be required to agree to pay its common laborers a minimum wage of 62-½ cents an
272 hour, the effect of such an increase in the present rate of wage for the common laborers employed by the Company, together with the necessary adjustment in the rates of wages now paid to the other wage earning employees of the Company, would be such as to make it impracticable for the Company to bid on any Government contracts.

MARJORIE WILFORD

Subscribed and sworn to before me this 24th day of February, 1939.

THOMAS F. HILBERT, JR.
Notary Public.

THOMAS F. HILBERT, JR.
Notary Public, Bronx County
Bronx Co. Clerk's No. 164, Reg. No. 172 H 39 N. Y. Co. Clerk's No. 813, Reg. No. 9 H 514
Certificates filed also in Richmond, Orange, Putnam and Rockland Co's.

Commission expires March 30, 1939

(Notarial Seal)

273 Filed February 28, 1939.

Temporary Restraining Order

Upon consideration of the verified complaint and the affidavits of J. A. Downey, Francis J. Tucker, Henry S. Evans, Marjorie Wilford, Darwin S. Wolcott, John W. Logan and Wilbert Wear, filed herein the 25th day
274 of February, 1939, and upon application by plaintiffs for a temporary restraining order, and after notice given, and hearing had, it appearing clearly that immediate and irreparable injury, loss and damage will result to the plaintiffs, and to each of them, by reason of the following:

1. The Act of Congress approved June 30, 1936 (Public —No. 846—74th Congress; 49 Stat. 2036-2039; c. 881), (hereinafter called the Public Contracts Act) provides, in substance and among other things, that in any contract made and entered into by any agency of the United States for the manufacture or furnishing of materials, supplies, articles and equipment in any amount exceeding $10,000, there shall be included a representation and stipulation "That all persons employed by the contractor * * * in the performance of the contract will be paid * * * not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles or equipment are to be manufactured or furnished under said contract * * *"; "*Provided*, however, That the provisions [of the Act] requiring the inclusions of representations with respect to minimum wages shall apply only to * * * contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor."

2. The defendant Charles V. McLaughlin, as Act-
275 ing Secretary of Labor, with the approval and acting participation of defendant Perkins, as Secretary of Labor, has made a determination under date of January 16, 1939, entitled "In the Matter of the Determination of the Prevailing Minimum Wages of the Iron and Steel Industry" (hereinafter referred to as the Determination),

which purports to define the Iron and Steel Industry and to determine the prevailing minimum wages for persons employed in the manufacture or furnishing of the products of such Industry in six areas, designated as "localities", which, in the aggregate, constitute the entire United States. Such Determination or "decision", as it has been referred to in a subsequent order dated January 30, 1939, of the defendant McLaughlin, is by its terms, as modified by such subsequent order, to become effective on March 1, 1939.

3. The Determination states that "in the locality consisting of Ohio, Pennsylvania, Delaware, Maryland, Kentucky, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire and Maine, and that portion of the State of West Virginia comprised within the counties of Hancock, Brooke, Ohio, Marshall, Harrison, and Monogalia, and the District of Columbia", the prevailing minimum wage is determined to be 62-½ cents per hour.

4. Plaintiffs allege that the Determination is void for the reasons, among others, that it is plainly con-
276 trary to the Public Contracts Act, arbitrary and capricious, and unsupported by any evidence taken at the hearing in the above-entitled matter and an attempt to raise and fix wages rather than an ascertainment of minimum wages currently paid and actually prevailing in the several localities in which their plants are situated. As further grounds for relief, they alleged that such hearing was not fair and impartial.

5. The plaintiffs allege that they are among the smaller manufacturers of iron and steel products; that they have been selling iron and steel products to agencies of the United States for years; that at the present time some of them are engaged in performance of contracts with such agencies covering the manufacture of substantial amounts of iron and steel products; that the wages paid to common laborers by the several plaintiffs vary, depending on the particular plaintiff and the particular locality, from 50-½ cents to 56-½ cents per hour; that the 62-½ cent rate provided in the Determination is, except in one instance, not paid by any iron and steel company in any city, county, village or other civil subdivision of any State in which the plants of any of the plaintiffs are located; that a rate lower

than 62-½ cents per hour is paid by all but 3 (employing a relatively small number of common laborers) of 60 plants operating in the entire area comprising the New England States and the States of Delaware, New Jersey and Maryland, that part of the States of New York and Pennsylvania lying east of a line drawn north and south through the most easterly point of Altoona, Pennsylvania, and that part of the State of West Virginia lying south of a line drawn west in extension of the southerly boundary of the State of Pennsylvania; and that the plants of all plaintiffs are situated in such area.

277 6. Between March 1, 1939, and March 10, 1939, bids heretofore invited on four contracts, designated Nos. 5681, 5682, 900/2380 and 900/2381 (hereinafter referred to as the "Contracts") for the manufacture of iron and steel products for very substantial amounts will be opened by the Navy Department, with a view to awarding contracts thereon. Plaintiffs Lukens Steel Company, Alan Wood Steel Company and Central Iron and Steel Company, are desirous of bidding on the Contracts.

7. Plaintiffs allege that if the Determination is permitted to become effective, said three plaintiffs will be unable to bid on the Contracts, on which bids have been invited by the Secretary of the Navy, and are to be opened on March 2 and March 9, 1939, without agreeing to pay minimum wages of 62-½ cents per hour to common laborers engaged in the performance thereof since defendant McLaughlin has determined that the prevailing minimum wages being paid to common laborers in the iron and steel industry in the locality in which said three plaintiffs are located are 62-½ cents per hour, and that such determination shall apply to all contracts awarded after March 1, 1939 (whether or not pursuant to invitations for bids issued prior to said date), and since defendant Peoples has directed and intends to continue to direct every agency of the United States desiring to enter into any such contract after March 1, 1939, to include a stipulation or representation therein that all persons employed by the contractor in the performance of the contract will be paid not less than the minimum wages set forth in the Determination, and since defendant Swanson, unless restrained, intends to and will give

effect to said Determination by rejecting any bid not containing such a stipulation or representation.

278 8. Plaintiffs allege that an increase in the present wages paid by plaintiffs to common laborers on Government contracts will, as a practical matter, bring or tend to bring about an increase in plaintiffs' wage rates for all classes of wage-earners and all classes of work. Moreover, plaintiffs allege that if the Determination becomes effective, there is grave danger that they will no longer be able successfully to compete, in Government business, with large, fully integrated companies with plants located to the west or south which enjoy more favorable geographical positions and which are already paying 62-½ cents an hour or are not required by the Determination to pay more than 45 cents an hour.

9. Plaintiffs allege that they have no adequate remedy at law, or, indeed, any remedy whatsoever at law.

IT IS ORDERED, ADJUDGED AND DECREED:

That defendants Frances Perkins, individually and as Secretary of Labor and Claude Augustus Swanson, individually and as Secretary of the Navy of the United States, their officers, agents, assistants, employees, representatives and attorneys, and any one associated with or acting in concert or participation with them, or any of them, and their successors in office, and each of them, and their officers, agents, assistants, employees, representatives and attorneys, and any one associated with or acting in concert or participation with them or any of them, and each of them, be, and each of them hereby is, enjoined and restrained from (i) giving any effect whatsoever to said Determination of defendant McLaughlin with respect to any bids which may be submitted by plaintiffs Lukens Steel

279 Company, Alan Wood Steel Company and Central Iron and Steel Company on the Contracts, and (ii) from refusing to accept any bids made by said three plaintiffs on the Contracts on the ground that such bids do not contain the stipulation or representation that all persons employed by the contractor will be paid not less than the minimum wages set forth in the Determination. This Order shall not prevent defendant Swanson from refusing to accept any such bid on the Contracts for the reason that

such bid is not the lowest bid or for any other reason permitted by law except as herein provided.

This order shall expire on March 7th, 1939 unless within said time it is extended for a like period for good cause shown or further modified by order of this Court, provided that the plaintiffs herein furnish a joint and several bond or an undertaking to defendants Perkins and Swanson as required by Rule 65(c) of the Federal Rules of Civil Procedure in the sum of $25,000, or make a deposit in the Registry of this Court of the sum of $25,000 in lieu thereof.

JENNINGS BAILEY
Justice.

Issued at 3:28 o'clock P. M., this 28th day of February, 1939.

Filed and entered at 4 o'clock P. M., this 28th day of February, 1939.

280 Filed March 1, 1939.

Order

IT IS ORDERED that the above-entitled cause be, and the same hereby is, set down for final hearing on Tuesday, March 7, 1939, at ten o'clock A. M., and that a copy of this order be served on each of the defendants herein.

JENNINGS BAILEY
Justice.

No objection:

H. L. UNDERWOOD
Assistant United States Attorney

281 Filed March 1, 1939.

Notice

To:

Madam Frances Perkins,
Individually and as Secretary of Labor,
14th Street and Constitution Avenue,
Washington, D. C.

Charles V. McLaughlin, Esq.,
Individually and as Assistant Secretary of Labor,
14th Street and Constitution Avenue,
Washington, D. C.

L. Metcalfe Walling, Esq.,
Individually and as Administrator of the Division of Public Contracts of the Department of Labor,
14th Street and Constitution Avenue
Washington, D. C.

Henry Morgenthau, Jr., Esq.,
Individually and as Secretary of the Treasury,
15th Street and Pennsylvania Avenue,
Washington, D. C.

Christian Joy Peoples, Esq.,
Individually and as Director of the Procurement Division of the Department of the Treasury,
7th & D Streets, S. W.,
Washington, D. C.

Claude Augustus Swanson, Esq.,
Individually and as Secretary of the Navy,
18th Street and Constitution Avenue,
Washington, D. C.

282 Harry Hines Woodring, Esq.,
Individually and as Secretary of War,
17th Street, South of Pennsylvania Avenue,
Washington, D. C.

Harold L. Ickes, Esq.,
Individually and as Secretary of the Interior,
Interior Building,
Washington, D. C.

James A. Farley, Esq.,
Individually and as Postmaster General,
Pennsylvania Avenue, between 12th and 13th Streets
Washington, D. C.

Frank Murphy, Esq.,
Attorney General of the United States,
Department of Justice,
Washington, D. C.

David A. Pine, Esq.,
United States Attorney for the District of Columbia,
Court House,
Washington, D. C.

PLEASE TAKE NOTICE that the Court has set the above-entitled cause down for final hearing at ten o'clock A. M., Tuesday, March 7, 1939, in accordance with its order, copy of which is attached hereto,

FURTHER PLEASE TAKE NOTICE that at said hour and date aforesaid, or as soon thereafter as counsel can be heard, the plaintiffs' Motion for Preliminary Injunction, copy of which is attached hereto, will likewise be brought on for hearing.

O. MAX GARDNER,
Office & P. O. Address:
Woodward Building,
Washington, D. C.

ROBERTS B. THOMAS,
Office & P. O. Address:
101 Park Avenue,
New York, N. Y.

GARDNER, MORRISON & ROGERS,
Office & P. O. Address:
Woodward Building,
Washington, D. C.

283

WEBSTER & GARSIDE,
Office & P. O. Address:
15 Broad Street,
New York, N. Y.

HAUSE, EVANS, STOREY & LICK,
Office & P. O. Address:
Telegraph Building,
Harrisburg, Pa.

COOK & MARKELL,
Office & P. O. Address:
First National Bank Building,
Baltimore, Maryland.

GEORGE WALTER WITNE
Office & P. O. Address:
Finance Building,
Philadelphia, Pa.

Attorneys for Plaintiffs.

284 Filed March 3, 1939.

It having been orally stated to me by counsel for the de fendants that the defendants will not be able to file an swers before Tuesday next, but will file a motion to dis miss the complaint during the afternoon of this day (March 3rd, 1939), it is ordered that the motion or motions to dis miss be set for hearing on Tuesday next, that date being the day for the expiration of the temporary restraining order heretofore made, and for the hearing of such other motions as to the continuance of the temporary restrain ing order or for a temporary injunction as counsel may be advised.

JENNINGS BAILEY
Justice

285 Filed March 6, 1939.

Motion to Dismiss Complaint

The defendants move the Court to dismiss the complain and this action for the following reasons:

1. Because the court lacks jurisdiction of the subject matter of this action;

2. Because the complaint fails to state a claim upon which relief can be granted;

3. Because the complaint fails to allege facts showing any right of any of the plaintiffs entitling them to maintain this action;

4. Because the complaint fails to state any facts entitling any of the plaintiffs to any relief in equity;

5. Because the complaint fails to state facts entitling any of the plaintiffs to a declaratory judgment;

6. Because the facts alleged in the complaint show that this is a suit against the United States and the United States has not consented to be sued.

EDWARD J. ENNIS
Attorney, United States Department of Justice.
Attorney for the Defendants.

286 *Notice*

Filed March 6, 1939.

To:

O. Max Gardner,
Office & P. O. Address:
Woodward Building,
Washington, D. C.

Roberts B. Thomas,
Office & P. O. Address:
101 Park Avenue,
New York, N. Y.

Gardner, Morrison & Rogers,
Office & P. O. Address:
Woodward Building,
Washington, D. C.

Webster & Garside,
Office & P. O. Address:
15 Broad Street,
New York, N. Y.

Hause, Evans, Storey & Lick,
Office & P. O. Address:
Telegraph Building,
Harrisburg, Pa.

Cook & Markell,
Office & P. O. Address:
First National Bank Building,
Baltimore, Maryland.

George Walter Witney,
Office & P. O. Address:
Finance Building,
Philadelphia, Pa.

Attorneys for Plaintiffs.

Please take notice that the undersigned will bring the above motion on for hearing before this Court in the United States District Court Building, Washington, District of Columbia, on the 7th day of March, 1939, at eleven o'clock, A. M., or as soon thereafter as counsel can be heard.

EDWARD J. ENNIS
Attorney, United States Department of Justice.
Attorney for the Defendants

287 Filed March 6, 1939.

Motion to Intervene

Now comes the Steel Workers Organizing Committee by its attorneys and respectfully moves this court for an order granting leave to the Steel Workers Organizing Committee to intervene in the above-entitled proceedings, and for such other and further relief as may be proper, and for grounds of this motion show:

1) That the Intervenor has the right to intervene under Rule 24 of the Rules of Civil Procedure for the District Courts of the United States and under the provisions of the so-called Public Contracts Act of June 30, 1936. (49 Stat. 2036);

2) That the Intervenor has a substantial interest in these proceedings;

3) That the Intervenor was a party to the proceedings entitled "In the Matter of the Prevailing Minimum Wage in the Iron and Steel Industry" resulting in a determination, pursuant to the aforesaid Public Contracts Act, which are the subject of the action herein;

4) That the application for intervention herein is timely; Intervenor's interests are not adequately represented by any of the existing parties; Intervenor will be bound by any judgment in this action, and will be adversely af-

288 fected by any judgment, interlocutory or otherwise, granting in whole or in part the relief requested by the plaintiffs herein; Intervenor's claim, and the main action have common questions of law and fact, and the inter-

vention herein will in no wise delay or prejudice an adjudication of the rights of the original parties.

Respectfully submitted,

LEE PRESSMAN
JOSEPH KOVNER
ANTHONY WAYNE SMITH
Attorneys for Intervenors

SIDNEY V. SMITH
Of Counsel

289 Filed March 6, 1939

Notice of Motion for Leave to Intervene

Sirs:

Please take notice that on the annexed motion and petition, and on all other proceedings heretofore had herein, the undersigned will move before this court at a stated term thereof for motions, to be held at the District Court of the United States for the District of Columbia at 10:00 o'clock in the forenoon on the 6th day of March, 1939, or as soon thereafter as counsel can be heard, for an order granting leave to the Steel Workers Organizing Committee, to intervene in the above entitled proceedings, and for such other and further relief as may be proper.

Yours, etc.

LEE PRESSMAN
JOSEPH KOVNER
ANTHONY WAYNE SMITH
Attorneys for Intervenors

SIDNEY V. SMITH
Of Counsel

290 To:

O. Max Gardner
Woodward Building,
Washington, D. C.

Roberts B. Thomas,
101 Park Avenue,
New York, N. Y.

Gardner, Morrison & Rogers
Woodward Building,
Washington, D. C.

Webster & Garside
15 Broad Street,
New York City, N. Y.

Hause, Evans, Storey & Lick,
Telegraph Building,
Harrisburg, Pa.

Cook & Markell
First National Bank Bldg.
Baltimore, Md.

George Walter Witney
Finance Bldg.,
Philadelphia, Pa.

Attorneys for Plaintiffs

Edward J. Ennis, Attorney,
United States Department
of Justice,
Washington, D. C.
Attorney for Defendants

A copy of the foregoing Notice, Motion, Petition and Points and Authorities received this 6th day of March, 1939.

Copy received March 6, 1939 at 3.00 P. M.

GARDNER MORRISON & ROGERS
Attorney for Plaintiffs

EDWARD J. ENNIS
Attorney for Defendants

291 Filed March 6, 1939

Petition of Steel Workers Organizing Committee for Leave to Intervene.

The petition of the Steel Workers Organizing Committee for leave to intervene in these proceedings respectfully represents and alleges:

FIRST. The Steel Workers Organizing Committee (hereinafter referred to as SWOC) is an unincorporated association, with its principal office at 1500 Commonwealth Building, Pittsburgh, Pennsylvania; Philip Murray is its chairman and David McDonald is its secretary-treasurer; it is the nation-wide representative for purposes of collective bargaining of over 500,000 workers employed in the iron, steel, and tin, and allied products industry throughout the United States; it has collective bargaining agreements with over five hundred employers covering the majority and some of the largest of the producing units in said industry.

SECOND. On or about July 5th, 1938, Philip Murray, Chairman of the SWOC requested the Honorable Frances Perkins, Secretary of Labor, to determine the prevailing minimum wages for persons employed in the iron and steel industry pursuant to the provisions of the Public Contracts Act. A true and exact copy of the letter containing this request is attached hereto, made a part hereof and marked Exhibit "A".

292 THIRD. Section 2 of the Public Contracts Act approved June 30th, 1936 (49 Stat. 2036) provides in part as follows:

"All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: Provided, That no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America."

FOURTH. Pursuant to the provisions of the Public Contracts Act certain proceedings entitled "In the Matter of the Determination of the Prevailing Minimum Wages in the Iron and Steel Industry" were instituted on or about July 11th, 1938, and resulted in a determination of the prevailing minimum wages in the iron and steel industry. The said proceedings and determination are in all respects valid, lawful and constitutional. Intervenor

refers to Plaintiffs' Exhibits "A" and "E", purporting to be respectively a true and exact copy of the recommendations of the Public Contracts Board and of the determination by the Secretary of Labor of the prevailing minimum wages in the iron and steel industry.

FIFTH. The SWOC was a party to the aforesaid proceedings and presented evidence and made arguments on all matters and issues arising therein.

SIXTH. The SWOC has an interest in the controversy presented by the complaint herein in that, among other things:

a) As the complaint itself shows, the proceedings herein are essentially concerned with the validity of a determination by the federal government of what shall be the rate of wages to be paid to common laborers in the iron and steel industry employed on public contracts within the meaning of the Public Contracts Act. The complaint further
293 shows that the plaintiffs are now paying wage rates below the amount required to be paid by contractors under the terms of the aforesaid determination of the prevailing minimum wages in the iron and steel industry. By virtue of Section 2 of the Public Contracts Act herein mentioned, such workers have a right to recover any such underpayments of wages in a law suit brought on their behalf by the United States Attorney General.

b) The determination of the prevailing minimum wages in the iron and steel industry affects not only the employees of the plaintiff corporations but affects directly all of the common laborers in the iron and steel industry, and, by fixing the wage rate for the classification of common labor, directly affects wage rates to be paid to all workers in the iron and steel industry.

c) Throughout the aforesaid proceedings which followed the request made by Philip Murray, the workers in the iron and steel industry have relied upon SWOC for the full protection of their interest in any determination of the prevailing minimum wages under the Public Contracts Act, and SWOC has assumed this responsibility as the national collective bargaining representative of these iron and steel workers.

d) The determination of the prevailing minimum wage for the iron and steel industry reflects the wage and hour

standards achieved by SWOC through the process of collective bargaining. Such agreements are in accord with the fundamental policy of the federal government with respect to labor as set forth in the National Labor Relations Act, enacted July 5th, 1935, (49 Stat. 449) tending to promote industrial peace and eliminate labor disputes. The maintenance of production in the iron and steel industry without interruption by labor disputes is essential
294 to the welfare of this country, and many of these contracts covered by the aforesaid determination call for supplies to the Army and Navy for national defense.

SEVENTH. The intervention of SWOC is timely, its interest is not adequately represented by any of the existing parties, it will be bound by any judgment in the action and will be adversely affected by any judgment in whole or in part prayed for in the complaint; the intervenor's claim and the main action have common questions of law and fact, the intervention will not unduly delay and prejudice the adjudication of the rights of the original parties, and intervenor has no other adequate remedy to protect its interest.

WHEREFORE Steel Workers Organizing Committee respectfully prays this honorable Court:

1) That leave to intervene in the proceedings herein be granted on its own behalf and on behalf of those it represents, in the same manner and with the same effect as if named in the original complaint as a defendant with the full right to contest any issues of fact or law upon all matters raised by the proceedings herein;

2) That the relief prayed for in the complaint herein be denied and the said complaint be dismissed; and

3) For such other and further relief as may be proper.

Respectfully submitted,

LEE PRESSMAN
JOSEPH KOVNER
ANTHONY WAYNE SMITH

Of Counsel
SIDNEY V. SMITH

295 *Exhibit A*

Steel Workers Organizing Committee
Pittsburgh, Pa.

July 5, 1938.

Honorable Frances Perkins,
Secretary of Labor,
Washington, D. C.

Dear Miss Perkins:

On behalf of the Steel Workers Organizing Committee, I beg to request that you determine pursuant to the provisions of the Walsh-Healey Act, the prevailing minimum wages in the several occupations for persons employed in the steel manufacturing and steel fabricating industry.

Numerous contracts are being awarded by the United States Government to corporations in this industry and we believe that additional protection would be afforded to the steel workers through the determination of such prevailing minimum wages.

Very truly yours,

(signed) PHILIP MURRAY
Chairman

296 DISTRICT OF COLUMBIA: *ss*

Be it remembered that on this 6th day of March 1939, personally appeared before me, the undersigned, Lee Pressman who being duly sworn did depose and say that the facts set out in the foregoing petition are true to the best of his knowledge and belief, that he is one of the attorneys for the intervenor herein, that the reason why this petition is verified by him is that the principal officers of the intervenor are located at Pittsburgh, Pennsylvania, that the source of his knowledge and belief are his own personal knowledge and the records and correspondence of the intervenor.

LEE PRESSMAN

Sworn to and subscribed to before me this 6th day of March, 1939.

EDNA W. SCHALLER
Notary Public

(Seal)

297 Filed March 7, 1939.

Affidavit of Henry S. Evans

COMMONWEALTH OF PENNSYLVANIA
County of Dauphin, ss:

Before me, a Notary Public in and for the County of Dauphin, Commonwealth of Pennsylvania, personally appeared **Henry S. Evans** who being duly sworn according to law deposes and says:

1. I am the Executive Vice President of Central Iron & Steel Company (one of the Plaintiffs in the above entitled action) and have been continuously connected with my Company since 1915.

2. If the Determination of Defendant Perkins (acting by and through Defendant McLaughlin as Acting Secretary of Labor) promulgated 16 January, 1939, (attached as Exhibit F to our Complaint) had not been in effect on 2 March, 1939, or if this Court had granted the Restraining Order which Plaintiffs had originally requested, my Company would have submitted a bid to Defendant Swanson, as Secretary of the Navy, on 2 March, 1939, on Schedule 5681 for approximately 7375 tons of Plates, Sheets
298 and Strip (as set forth in Paragraph 58 of our Complaint). But in view of all the circumstances attending that bidding, my Company did not bid.

3. I am advised that when the said bids were opened on 2 March, 1939, the Carnegie-Illinois Steel Company (a large integrated steel producer in the Pittsburgh area) submitted the lowest of only three bids on the black (or non galvanized) plates. The bid which my Company had prepared and would have been submitted was actually lower than what I am advised was the bid of the Carnegie-Illinois Steel Company. My Company was prevented from submitting this lower bid on account of said Determination and the circumstances prevailing at that time.

4. My Company currently receives invitations to bid on iron and steel products which it produces from many governmental agencies. It is now in receipt of an invitation

from the Purchasing Officer of The Panama Canal dated 1 March, 1939, Schedule No. 3433, for steel plates in an amount which will subject the bid and the contract awarded thereon to the provisions of the Walsh-Healey Act. The bids are to be opened at 10:30 A. M. on 15 March, 1939. My Company desires to submit a bid on this invitation and if the said Determination were revoked or if its effective date were postponed until after 15 March, 1939, or if this Court should grant the relief necessary to permit my Company to bid, it will submit such a bid.

5. I am advised that within the near future other agencies of the government will issue invitations to bid on iron and steel products and my Company will bid on all such invitations for products it produces, if the said Determination is revoked or if its effective date is postponed, or if this Court grants the relief necessary to permit my Company to submit such a bid.

6. Further Deponent sayeth nothing.

HENRY S. EVANS

Signed and sworn to this 4th day of March, A. D. 1939.

HELEN M. MILLER
(Seal) *Notary Public*

Commission expires March 2, 1941

EDWARD J ENNIS
Attorney for Defendants

GARDNER, MORRISON & ROGERS
Attorneys for Plaintiffs

299 Filed March 7, 1939.

Affidavit of John W. Logan

COMMONWEALTH OF PENNSYLVANIA
County of Philadelphia ss.

John W. Logan, being duly sworn upon his oath deposes and says:

I am the ~~Secretary and~~ Treasurer of Alan Wood Steel Company (hereinafter called the "Company"), one of the plaintiffs in the above entitled action. The Company is

engaged in the production and sale of certain products of the iron and steel industry.

Invitations to bid were issued on a proposed contract Schedule No. 5681, by the Bureau of Supplies and Accounts of the Department of the Navy for approximately 7375 tons of steel plates, sheets and strip. The bids on said invitations were opened on March 2, 1929. The Company desired to bid on approximately 7000 tons of such iron and steel products and would have bid thereon if the relief of the character prayed for in the complaint had been granted. It did not bid thereon for the reason that said relief was not granted.

Invitations to bid have been issued on a proposed contract, Schedule No. 7147, by the Mare Island Navy Yard of San Francisco, California, for a quantity of sheets, the sales price of which would exceed $10,000. The bids on said invitations are to be opened on March 6, 1939.
300 The Company would bid on such sheets or a portion thereof if the relief of the character prayed for in the complaint had been granted.

The Company is continuing to bid on invitations to bid issued by agencies of the United States and covering products manufactured and sold by the Company where the amount involved is less than $10,000.

Your Deponent was advised by officials of the Navy Department during the past week that invitations to bid would be issued in the near future by the Navy Department on proposed contracts covering products of the class and character manufactured and sold by the Company and if this be true the Company is desirous of bidding on such contracts if the relief of the character prayed for in the complaint is granted and the determination of the Secretary of Labor with respect to the minimum wage rates in the iron and steel industry is revoked or rendered void.

On information and belief your Deponent avers that the prevailing minimum wage rates for industries within a radius of ten (10) miles of the plants of the Company are as follows:

Textile Industry	55.2¢	per hour
Cement Industry	57¢	" "
Rubber Industry	54.5¢	" "

JOHN W. LOGAN

Sworn to and subscribed before me this 4th day of March, A. D. 1939.

IDA H. OETTER
Notary Public

(Seal)

My commission expires March 9 1939

Service of the above affidavit is acknowledged March 7, 1939.

GARDNER, MORRISON & ROGERS
Attorneys for plaintiffs.

EDWARD J ENNIS
Attorney for Defendants

301 Filed March 8, 1939.

Affidavit of Fred W. Morrison

Fred W. Morrison, being duly sworn, deposes and says: I am of counsel for the plaintiffs in this action and make this affidavit in reply to that of M. L. Ring, verified the 6th day of March 1939 and made in opposition to the motion to preliminary injunction herein. I have read said affidavit of M. L. Ring and know the contents thereof. In that affidavit he states with respect to the opening of bids and the awarding of contracts pursuant to Navy schedule 5681 that bids for certain items in said schedule were filed by three bidders and that for certain other items in said schedule bids were filed by eight bidders. I am informed and verily believe my information to be correct that with respect to the items under said schedule on which but three bids were received the materials to be furnished under such items consisted of so-called black or ungalvanized plates and that the materials to be furnished under the items on which eight bids were received consisted of galvanized plates. I am also informed and verily believe my information to be true that the Public Contracts Division of the Labor Department has made a ruling to the effect that the furnishing of galvanized plates does not come under the determination which is the subject of this action.

302 I am also informed and verily believe my information to be true that the items under such said schedule calling for black plates far exceeded in value the items

calling for galvanized plates in that the estimated value of the contracts for black plates awarded under said schedule totaled some $350,000 while the estimated value of the contracts awarded for the items for galvanized plates totaled some $105,300.

FRED W. MORRISON

Subscribed and sworn to before me this 8th day of March, 1939.

EMMA NEAL McQUEEN
Notary Public

(Seal)

My Commission Expires Oct. 15, 1941

303 Filed March 9, 1939

Affidavit of Darwin S. Wolcott.

Darwin S. Wolcott, being duly sworn, upon his oath deposes and says:

I am Vice President of Lukens Steel Company hereinafter called the Company, one of the plaintiffs in the above entitled action. The Company is engaged in the production and sale of certain products of the iron and steel industry.

Invitations to bid were issued on a proposed contract, Schedule 5681, by the Bureau of Supplies and Accounts of the Department of the Navy for approximately 7375 tons of steel plates, sheets and strips. The bids on said invitation were opened on March 2nd, 1939. The Company desired to bid on approximately 7000 tons of such iron and steel products and would have bid thereon if the character of relief prayed for in the complaint had been granted. The Company had made up and prepared a bid and was ready and prepared to submit and file the same in due course but was advised by its counsel not to do so for and by reason of the matters and things set forth in said
304 complaint. It did not bid thereon because of the fact that the relief sought in said complaint had not been granted at the time that it was necessary to file said bid.

The Company is continuing to bid on invitations to bid by agencies of the United States covering products manufactured and sold by the Company where the amount involved is less than $10,000.

Your deponent has been advised during the past week that invitations to bid would be issued in the near future by the Navy Department on proposed contracts covering products of the class and character manufactured and sold by the Company. If this be true the Company is desirous of bidding on such contracts if the relief of the character prayed for in the complaint is granted and the determination of the Secretary of Labor with respect to the minimum wage rates in the iron and steel industry is revoked or rendered void.

On information and belief your deponent avers that the prevailing minimum wage rates for industries within a radius of thirty miles of the plants of the Company are as follows:

Coatesville, Penna:

Pennsylvania Railroad	45¢ per hour First Year 46¢ per hour Second Year 47¢ per hour Third Year 48¢ per hour Fourth Year
Philadelphia Electric Co.	45¢ to 55¢ (average 50¢) per hour.
City of Coatesville	48¢ per hour.
P. W. A. High School Project	50¢ per hour.
Coatesville Scrap Iron Co.	40¢ per hour.
305 Riebman & Co., Scrap Iron	40¢ per hour
Coatesville Plate Washer Co.	50¢ per hour
Lukens Steel Company	56½¢ per hour

Lenape Hydraulic & Forging Co., Lenape, Penna. ..... 50¢ per hour
Downington Iron Works, Downington, Penna. ..... 53¢ per hour
Lancaster Iron Works, Lancaster, Penna. ..... 45¢ per hour

DARWIN S. WOLCOTT,

Sworn to and subscribed before me this 8th day of March, 1939.

ARTHUR J. PURSSELL
(Seal) *Notary Public*

My commission expires Jany. 18, 1943.

GARDNER MORRISON & ROGERS,
Attys for Plaintiffs

306 Filed March 13, 1939.

Affidavit of James A Downey.

STATE OF MARYLAND
City of Baltimore ss:

James A. Downey, being duly sworn, deposes and says—

"I am the President of The Eastern Rolling Mill Company, hereinafter called the "Company", which is a Maryland corporation.

The Company, which regularly receives invitations to bid from the U. S. Navy Department, has recently received an invitation to bid on a proposed contract, schedule No. 5748, by the Bureau of Supplies and Accounts of the Department of the Navy, for approximately twenty tons of steel, corrosion-resisting sheet. The company desires to bid on this proposed contract for such corrosion-resisting sheet. The bids on said invitation are to be opened at 10 A. M. on Tuesday, March 14, 1939. Under the terms of the invitation to bid, the determination dated January 16, 1939, of Charles V. McLaughlin, as acting Secretary of Labor, in the Matter of the Determination of Prevailing Minimum Wages in the Iron and Steel Industry has been called to the attention of all bidders and all bidders must agree to pay the minimum wages specified therein. The Company will not bid on such contract if such determination is permitted to be effective and apply to such contract. The Company, however, desires and intends to bid on such contract provided that the relief asked for in the motion for a preliminary injunction in this matter is granted as prayed and no stipulation with respect to minimum wages is applicable to any bid on or to the performance of this contract.

JAMES A. DOWNEY

SUBSCRIBED and sworn to before me this 11th day of March, 1939.

ELSIE E. SCHUSTER
[Notarial Seal] *Notary Public.*

307 Filed March 13, 1939

Affidavit of John W. Logan

COMMONWEALTH OF PENNSYLVANIA
County of Philadelphia ss.

John W. Logan, being duly sworn upon his oath deposes and says:

I am the Secretary and Treasurer of Alan Wood Steel Company (hereinafter called the "Company"), one of the plaintiffs in the above entitled action. The Company is engaged in the production and sale of certain products of the iron and steel industry.

Invitations to bid were issued on a proposed contract 33119-A Schedule 1, by the Reclamation Bureau at Denver of the Department of the Interior for a quantity of steel plates. The bids on said invitations were opened on February 6, 1939. The Company bid on a portion of such steel plates.

On or about March 6, 1939 the Company received the following telegram from the aforesaid Reclamation Bureau:

"REY OUR BID UNDER INVITATION 33119-A SCHEDULE ONE ADVISE IMMEDIATELY IF YOU WILL ACCEPT DEPARTMENT OF LABOR WAGE DETERMINATION FOR IRON AND STEEL INDUSTRY DATED JANUARY 16, 1939 AND EFFECTIVE MARCH 1, 1939 AS A PART OF CONTRACT IF AWARDED TO YOU.

RECLAMATION BUREAU."

In reply thereto the Company sent the following telegram to said Reclamation Bureau:

308 "RECLAMATION BUREAU
DENVER COLO

RETEL SIXTH OUR QUOTATION BID FEBRUARY SIXTH PREDICATED LABOR RATES IN EFFECT AT THAT TIME. REGRET ARE NOT WILLING ACCEPT DEPARTMENT OF LABOR WAGE DETERMINATION AS WE ARE PARTICIPATING IN ACTION NOW PENDING IN COURT SEEKING PERMANENT INJUNCTION AGAINST THIS DETERMINATION.

ALAN WOOD STEEL CO."

JOHN W. LOGAN

Sworn to and subscribed before me this 11 day of March, 1939.

HENRY GROSS

(Seal) *Notary Public*

My commission expires Jany. 18, 1941

309 Filed March 13, 1939.

Affidavit of John W. Logan

COMMONWEALTH OF PENNSYLVANIA
County of Philadelphia ss.

John W. Logan, being duly sworn upon his oath deposes and says:

I am the Secretary and Treasurer of Alan Wood Steel Company (hereinafter called the "Company"), one of the plaintiffs in the above entitled action. The Company is engaged in the production and sale of certain products of the iron and steel industry.

Invitations to bid were issued on a proposed contract Schedule No. 3433 by the General Purchasing Officer of the Panama Canal dated March 1, 1939, for a quantity of materials including approximately 500 tons of steel plates, and the contract which will be awarded thereon will be subject to the provisions of the Public Contracts Act.

Subsequent to the issuance of said invitations to bid, the General Purchasing Officer of the Panama Canal notified the Company that any contracts awarded pursuant to said invitations to bid will be subject to the determination by

the Secretary of Labor of the prevailing minimum wages in the iron and steel industry.

The bids on said invitations will be opened on March 15, 1939.

310 The Company desires to bid on approximately 500 tons of such steel plates and will bid thereon if the relief of the character prayed for in the Complaint is granted and the determination of the Secretary of Labor with respect to the minimum wage rates in the iron and steel industry is revoked or rendered void.

The Company will not however bid on such contract so long as said determination continues in force and effect.

JOHN W. LOGAN

Sworn to and subscribed before me this 11 day of March, 1939.

HENRY GROSS
Notary Public

(Seal)

My commission expires Jany. 18, 1941

311 Filed March 14, 1939.

Order Granting Leave to Amend Complaint

Upon motion made in open court by counsel for the plaintiffs for leave to amend the complaint herein, and it appearing to this Court that justice requires that such leave be given,

IT IS HEREBY ORDERED:

1. That plaintiffs have leave to amend the complaint herein in the manner set forth in Schedule A annexed hereto.

2. That the complaint herein shall be deemed to be so amended forthwith.

3. The plaintiffs shall serve a copy of this order upon counsel for the defendants herein not later than March 14, 1939.

JENNINGS BAILEY
Justice.

Dated, March 14, 1939.

312 *Schedule A*

In the District Court of the United States
for the District of Columbia

CIVIL ACTION FILE No. 1839

LUCKENS STEEL COMPANY, ET AL., *Plaintiffs,*

—against—

FRANCES PERKINS, ET AL., *Defendants.*

Amendments to Complaint for Injunction and Declaratory Judgment

To the Honorable, the Judges of the District Court of the United States for the District of Columbia:

The Complaint for Injunction and Declaratory Judgment filed herein on February 25, 1939, is hereby amended as follows:

1. The second sub-paragraph of paragraph 3 of said Complaint is hereby amended to read as follows:

"At its above-mentioned plant Lukens employs at the present time approximately 2,000 wage earners, of whom approximately 125 are common laborers. Such common laborers are paid at the rate of 56½ cents an hour. Substantially all the other wage earners employed by Lukens at such plant are paid at rates of pay in excess of such rate of pay for common labor."

2. The second sub-paragraph of paragraph 9 of said Complaint is hereby amended to read as follows:

"At its above-mentioned plant Atlantic employs at the present time approximately 150 wage earners, of whom approximately 15 are common laborers, paid at the rate of 52½ cents an hour, which is the base rate of pay of Atlantic for common labor. Substantially all the other wage earners employed by Atlantic at such plant are paid at rates of pay in excess of such base rate of pay for common labor, which rates are generally computed by adding various differentials to such base rate."

313 3. The following paragraph is inserted after paragraph 10 and preceding paragraph 11 of said Complaint:

"10A. The respective plaintiffs have generally realized profits from the sale by them to agencies of the United States of iron and steel products as aforesaid."

4. Paragraph 51 of said Complaint is hereby amended to read as follows:

"51. For the purposes of the Determination, the defendant McLaughlin treated the common labor base rates of the various members of the industry which had submitted wage data to the Board as the minimum wages paid by such members.

"Upon information and belief, the defendant McLaughlin in making the Determination accepted, approved and adopted the findings of fact (including the findings in respect of wage data), as distinguished from the inferences and conclusions therefrom (with some of which said defendant disagreed), set forth in the Report.

"62½ cents per hour was not at the date of the wage data set forth in the Record and the Report or at the date of the Determination or at any time subsequent thereto, and is not now, the prevailing common labor base rate, or the prevailing minimum wage, in the Iron and Steel Industry, in or in the immediate vicinity of any city, county, village or other State civil subdivision in which any of the plants of the plaintiffs are located, or in any small geographical area surrounding any such plant or city, county, village or other State civil subdivision, but, as shown herein and as appears from the findings of fact in the Report, such prevailing common labor base rates, and prevailing minimum wages, were at all such times and are now substantially lower than 62½ cents per hour.

"Plaintiffs are informed and believe, and therefore aver, that, as appears from the face of the Determination and the Report setting forth the wage data on which the Determination was based, the Determination constitutes an attempt on the part of the defendants Perkins and McLaughlin, purporting to act in their respective official capacities above set forth and under the guise and pretense of determining the minimum wages actually prevailing in the respective localities in which the plants of plaintiffs and other manufacturers of products of the Iron and Steel Industry are located, but, in fact, acting completely beyond any authority conferred upon them by law, to raise and fix the wage rates to be paid at such plants."

314 5. Paragraph 52 of said Complaint, through and including the second sentence of sub-paragraph (b) thereof, is hereby amended to read as follows:

"52. Plaintiffs are informed and believe, and, therefore, aver, that even if, as erroneously concluded by the defendant McLaughlin in the Determination, the Act conferred authority upon the Secretary of Labor in the light of relevant economic factors to determine that any geographic area, however large, was a 'locality' for the purpose of determining the prevailing minimum wages paid in the Iron and Steel Industry therein, the conclusion reached in the Determination that the States of Ohio, Pennsylvania, Delaware, Maryland, Kentucky, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire and Maine and that portion of the State of West Virginia comprised within the Counties of Hancock, Brooke, Ohio, Marshall, Harrison and Monongalia and the District of Columbia comprise a single 'locality' for such purpose is wholly arbitrary and capricious and without warrant in law for the following reasons, among others:

"(a) The only so-called economic factor which is referred to in the Determination in that regard is the alleged fact that a single market area is predominantly served by the plants in the Iron and Steel Industry located in the above-mentioned area. On information and belief, such alleged fact (the existence of which plaintiffs deny) was wholly irrelevant to the determination of prevailing minimum wages in a locality in which iron and steel products are manufactured; and in giving controlling significance thereto the defendant McLaughlin completely misconstrued the Act and, in effect, converted it into one authorizing the fixing of wages that are to prevail for persons employed by manufacturers (wherever located) who market their products in the same area;

"(b) The defendant McLaughlin in the Determination completely and erroneously ignored the facts set forth in the Report and the Record which showed the existence of well-defined and long-established wage differentials existing among various districts in the so-called 'locality' above mentioned. Such facts, which were undisputed, were to the effect that, and plaintiffs allege that, there are in the Iron and Steel Industry well recognized and long-existing wage

differentials between the plants in the industry which are located in the Western portion (hereinafter sometimes called the Western District) of the so-called 'locality' referred to in sub-paragraph (a), above and those plants which were included by said defendant in said 'locality' but which are also located in what are known in the industry as the 'Eastern District', the 'Buffalo District' and the 'Johnstown District'."

315 6. That portion of paragraph 55 of said Complaint to the commencement of sub-paragraph (a) thereof is hereby amended to read as follows:

"55. The plaintiffs are informed and believe, and, therefore, aver, that the purported determination referred to in the foregoing paragraph 44 hereof is arbitrary and capricious and without warrant in law for the reason that it was made by the defendant McLaughlin without there having been accorded to the plaintiffs the fair hearing which the Secretary of Labor was required by the Act, and particularly Section 5 thereof, to give to the plaintiffs prior to the making of any determination of the prevailing minimum wages in the Iron and Steel Industry in the respective localities in which the plants of the plaintiffs are located, in that:"

7. The last sub-paragraph of paragraph 58 of said Complaint is hereby amended to read as follows:

"Plaintiffs Lukens, Alan Wood and Central desire to, and, if the Determination shall not become effective, will, submit bids on the above-mentioned Schedule 5681; and some or all of the plaintiffs desire to, and, if the Determination shall not become effective, will, submit bids on some or all of the other schedules above set forth; and, in each such instance, plaintiffs intend to submit bids at prices which at the time they shall deem high enough to enable them to realize profits on any contracts that may be awarded to them."

8. Paragraph 60 of said Complaint is hereby amended to read as follows:

"60. Appropriations which are among the largest, if not the largest in the nation's history for the purchase by the Department of the Navy, the War Department, the Department of the Treasury, the Department of the Interior and the Post Office Department of products of the Iron and

Steel Industry (as defined in the Determination) have been made within the past year and, on information and belief, will be made within the immediate future. Large sums out of the appropriations heretofore made for such purchases have not yet been expended. On information and belief, invitations to bid on numerous large and important contracts for the purposes hereinabove referred to, as well as for the purchase by other agencies of the United States of products of the Iron and Steel Industry (as so defined), will be issued, and such contracts will be awarded, within the immediate future.

"Plaintiffs are desirous of bidding on such con-
316 tracts, and the respective plaintiffs intend, if the Determination shall not become effective, to bid on various of such contracts as shall pertain to products manufactured and sold by them, respectively, at prices which at the time they shall deem high enough to enable them to realize profits on any such contracts that may be awarded to them."

O. MAX GARDNER,
Office & P. O. Address:
Woodward Building,
Washington, D. C.

ROBERTS B. THOMAS,
Office & P. O. Address:
101 Park Avenue,
New York, N. Y.

GARDNER, MORRISON & ROGERS,
Office & P. O. Address:
Woodward Building,
Washington, D. C.

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MORGAN, LEWIS & BOCKIUS,
Office & P. O. Address:
2107 Fidelity-Philadelphia
Trust Building,
Philadelphia, Pa.

Attorneys for Plaintiffs.

317 *District of Columbia ss:*

Roberts B. Thomas, being first duly sworn, according to law, upon oath deposes and says:

I am a citizen of the United States, over 21 years of age, and a resident of the County of Nassau, State of New York, and am an attorney duly admitted to practice in all the courts of the State of New York, the Supreme Court of the United States and the United States Court of Appeals for the District of Columbia. I am attorney for the plaintiffs named in the Complaint referred to in the foregoing Amendments to Complaint for Injunction and Declaratory Judgment. All said plaintiffs are corporations and are absent from the District of Columbia. I have read said Amendments and verily believe the facts stated therein to be true.

(Signed) ROBERTS B. THOMAS

Subscribed and sworn to before me this 9th day of March 1939

(Signed) EMMA NEAL McQUEEN
Notary Public, D. C.

My Commission Expires Oct. 15, 1941
(Notarial Seal)

318 Filed March 14, 1939

Amendments to Complaint for Injunction and Declaratory Judgment

To the Honorable, the Judges of the District Court of the United States for the District of Columbia:

The Complaint for Injunction and Declaratory Judgment filed herein on February 25, 1939, is hereby amended as follows:

1. The second sub-paragraph of paragraph 3 of said Complaint is hereby amended to read as follows:

"At its above-mentioned plant Lukens employs at the present time approximately 2,000 wage earners, of whom approximately 125 are common laborers. Such common laborers are paid at the rate of 56-½ cents an hour. Substantially all the other wage earners employed by Lukens at such plant are paid at rates of pay in excess of such rate of pay for common labor."

2. The second sub-paragraph of paragraph 9 of said Complaint is hereby amended to read as follows:

"At its above-mentioned plant Atlantic employs at the present time approximately 150 wage earners, of whom approximately 15 are common laborers, paid at the rate of 52-½ cents an hour, which is the base rate of pay of Atlantic for common labor. Substantially all the other wage earners employed by Atlantic at such plant are paid at rates of pay in excess of such base rate of pay for common labor, which rates are generally computed by adding various differentials to such base rate."

319 3. The following paragraph is inserted after paragraph 10 and preceding paragraph 11 of said Complaint:

"10A. The respective plaintiffs have generally realized profits from the sale by them to agencies of the United States of iron and steel products as aforesaid."

4. Paragraph 51 of said Complaint is hereby amended to read as follows:

"551. For the purposes of the Determination, the defendant McLaughlin treated the common labor base rates of the various members of the industry which had submitted

wage data to the Board as the minimum wages paid by such members.

"Upon information and belief, the defendant McLaughlin in making the Determination accepted, approved and adopted the findings of fact (including the findings in respect of wage data), as distinguished from the inferences and conclusions therefrom (with some of which said defendant disagreed), set forth in the Report.

"62-½ cents per hour was not at the date of the wage data set forth in the Record and the Report or at the date of the Determination or at any time subsequent thereto, and is not now, the prevailing common labor base rate, or the prevailing minimum wage, in the Iron and Steel Industry, in or in the immediate vicinity of any city, county, village or other State civil subdivision in which any of the plants of the plaintiffs are located, or in any small geographical area surrounding any such plant or city, county, village or other State civil subdivision, but, as shown herein and as appears from the findings of fact in the Report, such prevailing common labor base rates, and prevailing minimum wages, were at all such times and are now substantially lower than 62-½ cents per hour.

"Plaintiffs are informed and believe, and therefore aver, that, as appears from the face of the Determination and the Report setting forth the wage data on which the Determination was based, the Determination constitutes an attempt on the part of the Defendants Perkins and McLaughlin, purporting to the act in their respective official capacities above set forth and under the guise and pretense of determining the minimum wages actually prevailing in the respective localities in which the plants of plaintiffs and other manufacturers of products of the Iron and Steel Industry are located, but, in fact, acting completely beyond any authority conferred upon them by law, to raise and fix the wage rates to be paid at such plants."

320 5. Paragraph 52 of said Complaint, through and including the second sentence of sub-paragraph (b) thereof, is hereby amended to read as follows:

"52. Plaintiffs are informed and believe, and, therefore aver, that even if, as erroneously concluded by the defendant McLaughlin in the Determination, the Act conferred

authority upon the Secretary of Labor in the light of relevant economic factors to determine that any geographic area, however large, was a 'locality' for the purpose of determining the prevailing minimum wages paid in the Iron and Steel Industry therein, the conclusion reached in the Determination that the States of Ohio, Pennsylvania, Delaware, Maryland, Kentucky, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire and Maine and that portion of the State of West Virginia comprised within the Counties of Hancock, Brooke, Ohio, Marshall, Harrison and Monongalia and the District of Columbia comprise a single 'locality' for such purpose is wholly arbitrary and capricious and without warrant in law for the following reasons, among others:

"(a) The only so-called economic factor which is referred to in the Determination in that regard is the alleged fact that a single market area is predominantly served by the plants in the Iron and Steel Industry located in the above-mentioned area. On information and belief, such alleged fact (the existence of which plaintiffs deny) was wholly irrelevant to the determination of prevailing minimum wages in a locality in which iron and steel products are manufactured; and in giving controlling significance thereto the defendant McLaughlin completely misconstrued the Act and, in effect, converted it into one authorizing the fixing of wages that are to prevail for persons employed by manufacturers (wherever located) who market their products in the same area;

"(b) The defendant McLaughlin in the Determination completely and erroneously ignored the facts set forth in the Report and the Record which showed the existence of well-defined and long-established wage differentials existing among various districts in the so-called 'locality' above mentioned. Such facts, which were undisputed, were to the effect that, and plaintiffs allege that, there are in the Iron and Steel Industry well recognized and long-existing wage differentials between the plants in the industry which are located in the Western portion (hereinafter sometimes called the Western District) of the so-called 'locality' referred to in sub-paragraph (a) above and those plants which were included by said defendant in said 'locality' but which are also located in what are known in the industry as the

'Eastern District', the 'Buffalo District' and the
321 'Johnstown District'."

6. That portion of paragraph 55 of said Complaint to the commencement of sub-paragraph (a) thereof is hereby amended to read as follows:

"55. The plaintiffs are informed and believe, and, therefore, aver, that the purported determination referred to in the foregoing paragraph 44 hereof is arbitrary and capricious and without warrant in law for the reason that it was made by the defendant McLaughlin without there having been accorded to the plaintiffs the fair hearing which the Secretary of Labor was required by the Act, and particularly Section 5 thereof, to give to the plaintiffs prior to the making of any determination of the prevailing minimum wages in the Iron and Steel Industry in the respective localities in which the plants of the plaintiffs are located, in that;"

7. The last sub-paragraph of paragraph 58 of said Complaint is hereby amended to read as follows:

"Plaintiffs Lukens, Alan Wood and Central desire to, and, if the Determination shall not become effective, will, submit bids on the above-mentioned Schedule 5681; and some or all of the plaintiffs desire to, and, if the Determination shall not become effective, will, submit bids on some or all of the other schedules above set forth; and, in each such instance, plaintiffs intend to submit bids at prices which at the time they shall deem high enough to enable them to realize profits on any contracts that may be awarded to them."

8. Paragraph 60 of said Complaint is hereby amended to read as follows:

"60. Appropriations which are among the largest, if not the largest in the nation's history for the purchase by the Department of the Navy, the War Department, the Department of the Treasury, the Department of the Interior and the Post Office Department of products of the Iron and Steel Industry (as defined in the Determination) have been made within the past year and, on information and belief, will be made within the immediate future. Large sums out of the appropriations heretofore made for such purchases have not yet been expended. On information and belief, invitations to bid on numerous large and important contracts

for the purposes hereinabove referred to, as well as for the purchase by other agencies of the United States of products of the Iron and Steel Industry (as so defined), will be issued, and such contracts will be awarded, within the immediate future.

"Plaintiffs are desirous of bidding on such con-
322 tracts, and the respective plaintiffs intend, if the Determination shall not become effective, to bid on various of such contracts as shall pertain to products manufactured and sold by them, respectively, at prices which at the time they shall deem high enough to enable them to realize profits on any such contracts that may be awarded to them."

O. MAX GARDNER,
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Woodward Building,
Washington, D. C.

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FREDERICK H. KNIGHT,
MORGAN, LEWIS & BOCKIUS,
Office & P. O. Address:
2107 Fidelity-Philadelphia
Trust Building,
Philadelphia, Pa.

Attorneys for Plaintiffs.

323 *District of Columbia, ss:*

Roberts B. Thomas, being first duly sworn, according to law, upon oath deposes and says:

I am a citizen of the United States, over 21 years of age, and a resident of the County of Nassau, State of New York, and am an attorney duly admitted to practice in all the courts of the State of New York, the Supreme Court of the United States and the United States Court of Appeals for the District of Columbia. I am attorney for the plaintiffs named in the Complaint referred to in the foregoing Amendments to Complaint for Injunction and Declaratory Judgment. All said plaintiffs are corporations and are absent from the District of Columbia. I have read said Amendments and verily believe the facts stated therein to be true.

ROBERTS B. THOMAS

Subscribed and sworn to before me this 9th day of March, 1939

EMMA NEAL McQUEEN

(Notarial Seal) *Notary Public, D. C.*

My Commission Expires Oct. 15, 1941

324 Filed March 14, 1939

Order Making of Record Extensions Of Temporary Restraining Order

The Court hereby makes of record the facts that the temporary restraining order issued by this Court and filed

February 28, 1939, was, during the argument of the motion of the defendants to dismiss the Complaint, by the Court from time to time extended to and including the entry of an order disposing of such motion, and, upon representation of counsel for the defendants that said order as so extended would be observed by the defendants without its being reduced to writing and formally served on the defendants, such reduction to writing and formal service were dispensed with.

JENNINGS BAILEY
Justice.

Dated, March 14, 1939.

325 Filed March 14, 1939

Order Denying Motion, and Dismissing Petition, Of Steel Workers Organizing Committee for Leave to Intervene

This cause came on to be further heard at this term upon the motion and the petition of Steel Workers Organizing Committee for leave to intervene in the above-entitled cause and was argued by counsel; and thereupon, upon consideration thereof, it is this 14th day of March, 1939,

ADJUDGED, ORDERED and DECREED that the motion of Steel Workers Organizing Committee for leave to intervene in the above-entitled cause be, and it hereby is, denied, and the petition of Steel Workers Organizing Committee for leave to intervene in the above-entitled cause be, and it hereby is, dismissed.

JENNINGS BAILEY
Justice.

326 Filed March 14, 1939

Judgment Dismissing Complaint, as Amended

This cause came on further to be heard at this term upon the motion of defendants to dismiss the Complaint for Injunction and Declaratory Judgment and was argued by counsel; and thereupon, upon consideration thereof, it is this 14th day of March, 1939,

ADJUDGED, ORDERED AND DECREED as follows:

1. The temporary restraining order heretofore issued herein be, and it hereby is, dissolved;

2. The motion to dismiss the Complaint for Injunction and Declaratory Judgment be, and it hereby is, granted; and

3. The Complaint for Injunction and Declaratory Judgment, as amended, be, and it hereby is, dismissed, with costs against the plaintiffs.

JENNINGS BAILEY
Justice.

Exception of the plaintiffs is hereby noted to the entry of paragraphs 1, 2, and 3 of the above Judgment and to so much thereof as refuses any of the relief herein prayed by the plaintiffs, and to the refusal of the Court to rule on and to grant plaintiffs' motion for a preliminary injunction on the ground that dismissal of the complaint, as amended, disposed of this action in this Court, and to the denial of plaintiffs' application for a stay and injunction pending appeal; and the plaintiffs, by their attorneys, in open Court petition for and note and notice an appeal from the above order to the United States Court of Appeals for the
327 District of Columbia on this 14th day of March, 1939, which appeal is hereby granted and noted, whereupon the maximum undertaking for costs is hereby fixed at Two hundred and fifty Dollars ($250.00) with leave to deposit the sum of One hundred Dollars ($100.00) with the Clerk of the Court in lieu thereof.

JENNINGS BAILEY
Justice.

328 Filed March 14, 1939

Notice of Appeal.

Notice is hereby given this 14th day of March, 1939, that Lukens Steel Company, Alan Wood Steel Company, South Chester Tube Company, Central Iron & Steel Company, Harrisburg Steel Corporation, The Eastern Rolling Mill Company and The Atlantic Wire Company hereby appeal to the United States Court of Appeals for the District of

lumbia from the final judgment of this Court entered in s action on the 14th day of March, 1939, in favor of de- dants Frances Perkins, individually and as Secretary of bor of the United States, Charles V. McLaughlin, in- idually and as Assistant Secretary of Labor of the ited States, L. Metcalfe Walling, individually and as ministrator of the Division of Public Contracts of the partment of Labor of the United States, Henry Morgen- u, Jr., individually and as Secretary of the Treasury of United States, Christian Joy Peoples, individually and as Director of the Procurement Division of the De- partment of the Treasury of the United States, Claude Augustus Swanson, individually and as Sec- ary of the Navy of the United States, Harry Hines oodring, individually and as Secretary of War of the ited States, Harold L. Ickes, individually and as Secre- y of the Interior of the United States, and James A. rley, individually and as Postmaster General of the ited States, and from each and every part thereof, in- ding paragraphs 1, 2 and 3 thereof and the refusal of s Court to rule on and to grant plaintiffs' motion for a eliminary injunction.

O. MAX GARDNER,
Office & P. O. Address:
Woodward Building,
Washington, D. C.

ROBERTS B. THOMAS,
Office & P. O. Address:
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FREDERICK H. KNIGHT,
MORGAN, LEWIS & BOCKIUS,
Office & P. O. Address:
2107 Fidelity-Philadelphia
Trust Building,
Philadelphia, Pa.

Attorneys for Plaintiffs

330 *Memorandum.*

MARCH 14, 1939

$100 deposited by Gardiner, Morrison & Rogers for plaintiffs in lieu of bond on appeal.

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331 Filed March 15, 1939.

Assignment of Errors

Now come the plaintiffs, Lukens Steel Company, Alan Wood Steel Company, South Chester Tube Company, Central Iron & Steel Company, Harrisburg Steel Corporation, The Eastern Rolling Mill Company and The Atlantic Wire Company, by their attorneys, and say that in the record and in the judgment entered in the above-entitled cause on March 14, 1939, there is error in the following respects:

I. The Court erred in overruling, denying and failing and refusing to grant plaintiffs' application for a temporary restraining order and in not issuing and extending a temporary restraining order, in the form and manner and to the extent as prayed.

II. The Court erred in issuing the temporary restraining order, as from time to time extended, limited in the form and manner and to the extent provided for in said order

III. The Court erred in dissolving the temporary
332 restraining order theretofore issued and extended by it.

IV. The Court erred in failing and refusing to rule on plaintiffs' motion and application for preliminary injunction, as provided in the order of the Court filed March 3, 1939.

V. The Court erred in failing and refusing to rule on and to grant plaintiffs' motion and application for a preliminary injunction.

VI. The Court erred in failing and refusing to grant to plaintiffs, and in not issuing, a preliminary injunction as prayed.

VII. The Court erred in failing and refusing to grant to plaintiffs, and in not issuing, a preliminary injunction, in substance (a) restraining and enjoining the defendants Perkins, McLaughlin, and Walling, individually and in their respective official capacities, from continuing in effect, and holding o t as effective, valid or authorized by law, the purported Determination of prevailing minimum wages in the Iron and Steel Industry issued under date of January 16, 1939, by the defendant Charles V. McLaughlin, as Acting Secretary of Labor (hereinafter called the Determination), and (b) restraining and enjoining the other defendants, individually and in their respective official capacities, from giving effect to the Determination in the bidding upon, and award of, contracts for products of the Iron and Steel Industry subject to the Public Contracts Act (Act of
333 Congress approved June 30, 1936; Public—No. 846—74th Cong.; 49 Stat. 2036-2039, c. 881).

VIII. The Court erred in dismissing plaintiffs' complaint for injunction and declaratory judgment, as amended.

IX. The Court erred in granting, and in failing and refusing to deny, defendants' motion to dismiss.

X. The Court erred in failing and refusing to grant to plaintiffs, and in not issuing, a permanent injunction as prayed.

XI. The Court erred in failing and refusing to enter, and in not entering, a judgment declaring and ordering, adjudging and decreeing that the Determination is invalid and unauthorized in law.

XII. The Court erred in overruling, denying and failing and refusing to grant plaintiffs' application for a stay and injunction pending appeal.

XIII. In other respects apparent of record.

For which errors the plaintiffs, Lukens Steel Company, Alan Wood Steel Company, South Chester Tube Company, Central Iron & Steel Company, Harrisburg Steel Corporation, The Eastern Rolling Mill Company and The Atlantic Wire Company, pray that the said judgment of the District Court of the United States for the District of Columbia, dated March 14, 1939, be reversed and that the cause be remanded to said Court with directions to overrule and deny the motion to dismiss, to grant a preliminary injunction as prayed, to grant a permanent
334 injunction as prayed, to enter a declaratory judgment as prayed and for costs.

O. MAX GARDNER
ROBERTS B. THOMAS
FREDERICK H. KNIGHT
Counsel for Plaintiffs-Appellants.

Receipt of a copy of the foregoing Assignment of Errors is hereby acknowledged this 15th day of March, 1939.

EDWARD J. ENNIS
Counsel for Defendants-Appellees.

335 *Docket Entries*

Date		Proceedings
1939		Deposit for costs by—Gardiner
Feb	25	Complaint & Exhibits (7)—Affidavits (7) filed
"	"	Summons & copies (11) complaint issued
"	27	Mo. of plff. for inj "
"	"	Memo & Request of Francis E. Walter to appear and be heard amicus curiae (Leave by Bailey J. in open court)
"	28	Temporary restraining order to expire Mar 7/39 provided pltfs furnish $25,000 bond or $25,000 deposit, issued 3:28 p m Feb 28/39 Bailey, J.

"	"	Deposit of $25,000 by cashier's check of Riggs National Bank, in Registry pursuant to order of this date
"	"	Deposit for copy of order by Fred W. Morrison
"	"	Certified copy of Temp. restr. order issued to Fred W. Morrison
"		P. & A. of plff in support of restraining order & Exh
Mch.	1	Mo. of plff. for preliminary injunction & Notice
"	"	Certified copies (3) of temporary restraining order & Deposit by Gardiner
"	"	Order setting final hearing for March 7/39, Bailey, J.
"	3	Memo, Bailey, J.
"	6	Mo. to dismiss complaint, Notice & P & A —by Ennis
"	6	Mo. of Steel Workers Organizing Committee for leave to intervene & Notice
"	"	Petn of Steel Workers Organizing Committee for leave to intervene App. Lee Pressman, Joseph Kovner, A. W. Smith & S. V. Smith
"	7	Affidavit of Henry S. Evans
"	"	" " Jno. W. Logan
"	"	Points & authorities of pltfs in opposition to motion to dismiss
"	9	Affi. of Darwin S. Wolcott
"	13	Affis (3) for plff.
"	14	Order granting plffs leave to amend compt & Exh Bailey J.
"	"	Amendments to comp't & Ack
"	"	Order extending temporary restraining order etc Bailey J
"	"	Order denying mo of Steel Workers Organizing Committee for leave to intervene and dismissing petition—Bailey J
"	"	Judgment dismissing compt as amended —Bailey J. Exceptions and Appeal noted—Bond fixed at $250 or $100 deposit—Bailey J

Date	Proceedings
" "	Order discharging undertaking and directing refund of $25000 security to Gardiner, Morrison & Rogers Bailey, J.
" 14	$24,750.00 paid to Gardner, Morrison & Rogers, Attys. for Plffs. check #2797,

336

1939

Mch. 14	Clerks commission on fund
" "	Deposit for commission by Reg. check #2798
" "	Notice of plff. of appeal—Copy mailed to E. J. Ennis
" "	Deposit by Gardiner, Morrison & Rogers for plff in lieu of bond on appeal:
" "	Deposit by Gardiner, Morrison & Rogers:
" 15	Assignment of Error.
" "	Designation of Record.

337 Filed March 15, 1939.

Praecipe and Designation of Record

The Clerk of the Court will please prepare the record on appeal in the above-entitled cause and include therein the following papers and proceedings:

(1) Complaint for injunction and Declaratory Judgment, filed February 25, 1939;

(2) Motion for Preliminary Injunction, filed February 27, 1939;

(3) Affidavits in Support of Preliminary Injunction, filed February 25, 1939;

(4) Temporary Restraining Order, filed February 28, 1939;

(5) Order Setting Cause down for Final Hearing, filed March 1, 1939;

(6) Notice of Motion for Preliminary Injunction, filed March 1, 1939;

(7) Order Setting Cause down for Hearing on
338 Motion to Dismiss and on Motions as Counsel may be Advised, filed March 3, 1939;

(8) Motion of Defendants to Dismiss Complaint, filed March 6, 1939;

(9) Defendants' Notice of Motion to Dismiss Complaint, filed March 6, 1939;

(10) Motion of Steel Workers Organizing Committee for Leave to Intervene, filed March 6, 1939;

(11) Notice of Motion of Steel Workers Organizing Committee, filed March 6, 1939;

(12) Petition of Steel Workers Organizing Committee for Leave to Intervene, filed March 6, 1939;

(13) Affidavit of Henry S. Evans, filed March 7, 1939;

(14) Affidavit of John W. Logan, filed March 7, 1939;

(15) Affidavit of Fred W. Morrison, filed March 8, 1939;

(16) Affidavit of Darwin S. Wolcott, filed March 9, 1939;

(17) Affidavit of James A. Downey, filed March 13, 1939;

(18) Affidavit of John W. Logan, filed March 13, 1939;

(19) Affidavit of John W. Logan, filed March 13, 1939;

(20) Order Granting Plaintiffs Leave to Amend Complaint, filed March 14, 1939;

339 (21) Amendments to Complaint, filed March 14, 1939;

(22) Order Making of Record Extensions of Temporary Restraining Order, filed March 14, 1939;

(23) Order Denying Motion of Steel Workers Organizing Committee for Leave to Intervene and Dismissing Petition, filed March 14, 1939;

(24) Judgment Dismissing Complaint as Amended, filed March 14, 1939;

(25) Plaintiffs' Exceptions and Notations of Appeal, filed March 14, 1939;

(26) Notice of Appeal, filed March 14, 1939;

(27) Assignment of Errors, filed March 15, 1939;

(28) Docket entries; and

(29) This Praecipe and Designation of Record, filed March 15, 1939.

O. MAX GARDNER
ROBERTS B. THOMAS
FREDERICK H. KNIGHT
Counsel for Plaintiffs.

Receipt of a copy of the foregoing Praecipe and Designation of Record is hereby acknowledged this 15th day of March, 1939.

EDWARD J. ENNIS
Counsel for Defendants.

340 District Court of the United States
for the District of Columbia

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, hereby certify the foregoing pages numbered from 1 to 339, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 1839, Civil Action, wherein Lukens Steel Company, a corporation, et al., are Plaintiffs and Frances Perkins, individually and as Secretary of Labor of the United States, et al., are Defendants, as the same remains upon the files and of record in said Court.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 17th day of March, 1939.

C. E. STEWART,

(Seal) *Clerk.*

CLERK'S MEMORANDUM:

Motion to add the following to printed record granted March 25, 1939.

341 Endorsed: United States Court of Appeals for the District of Columbia Filed Mar 25 1939 Joseph W. Stewart, Clerk

District Court of the United States for the District of Columbia

No. 1839—Civil Action

LUKENS STEEL COMPANY, ET AL., *plaintiffs*

vs.

FRANCES PERKINS, ET AL., *defendants*

I, Charles E. Stewart, Clerk of the District Court of the United States for the District of Columbia, do hereby certify the annexed to be a true and correct copy of the original Affidavit of Edward J. Ennis, Affidavit of M. L. Ring, and Defendants' Cross-Designations of Record on Appeal

(2), as (they) appear.... of record in the Clerk's Office of said Court in the aboye-entitled cause.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, this 25th day of March, 1939.

CHARLES E. STEWART,
Clerk.

By LYDIA M. GARDINER
Assistant Clerk.

342 Endorsed: Filed Mar 24 1939

In the District Court of the United States for the District of Columbia

Civil Action File No. 1839

LUKENS STEEL COMPANY, A CORPORATION, ET AL., *Plaintiffs,*

v.

FRANCES PERKINS, INDIVIDUALLY AND AS SECRETARY OF LABOR OF THE UNITED STATES, ET AL., *Defendants.*

Affidavit Opposing Motion for Preliminary Injunction.

Edward J. Ennis, being duly sworn, deposes and says:

1. I am of counsel for the defendants in this action and make this affidavit in support of a request for adjournment of the plaintiffs' motion for a preliminary injunction filed February 28, 1939, served on the United States Attorney March 2, 1939, and noticed for a hearing March 7, 1939.

2. This motion is made in this action by seven corporations engaged in the production of products of the iron and steel industry to obtain an injunction and a declaratory judgment against nine officials of the Government of the United States, including the Secretary of the Treasury, the Secretary of War, the Postmaster General, the Secretary of the Navy, the Secretary of the Interior and the Secretary of Labor, to enjoin them from making effective a determination of the Secretary of Labor concerning the payment of prevailing minimum wages for persons employed in the manufacture of materials furnished under government contracts.

3. The motion for preliminary injunction is made upon voluminous papers, including the verified complaint (31

pages), exhibits A to G annexed to the complaint (over 200 pages), and seven affidavits (30 pages) and points and authorities (50 pages). The complaint and affidavits allege a great many facts including the following:

a. That numerous large and important government contracts will be awarded in the immediate future by the defendants (complaint, p. 24);

343 b. That increase of common labor base rates of pay paid by the plaintiffs, who may obtain government contracts, will increase the base rates of pay for other wage earners of the plaintiffs engaged on work not related to government contracts (complaint, pp. 25-26);

(c) That if the plaintiffs are required to pay the minimum wages determined by the Secretary of Labor there is grave danger that they will no longer be able successfully to compete for government contracts with large, fully integrated companies, and that if they do not agree to pay such minimum wages they will be in grave danger of losing a substantial source of revenue (complaint, p. 26).

4. Defendants have not had an opportunity to investigate the truth of these and many other alleged facts or to obtain and present to this Court other facts concerning the nature of the plaintiffs' business and the probability of great and immediate pecuniary damage to the plaintiffs, which are relevant upon this application for a preliminary injunction.

5. The Points and Authorities of the plaintiffs on this motion raise many questions of law which defendants have not had an opportunity to consider fully in order to show the lack of probability of ultimate success in this action by the plaintiffs, an important consideration on an application for preliminary injunction.

6. The affiant has not had an opportunity to consult the representatives of many of the defendants concerning the facts and law in this action in so far as they affect the governmental departments of these defendants. Such preparation is necessary to make an adequate record on this motion.

7. On March 3, 1939, the affiant notified counsel that on March 7, 1939, defendants would request an adjournment of this motion.

8. If an adjournment is granted the defendants may, upon investigation and study, determine that answers may be

filed promptly and a final hearing had on the merits
344 in the interests of speedy justice and in accord with the practice of this Court in order to avoid a determination on this motion and a second similar determination on final hearing.

9. Any temporary restraining or injunctive relief to which the plaintiffs may be entitled may be obtained by application for a further preliminary restraining order pending determination of this motion for preliminary injunction or pending other disposition of this action.

WHEREFORE it is respectfully prayed that the plaintiffs' motion for a preliminary injunction be adjourned for thirty days.

EDWARD J. ENNIS

Sworn to before me this 6th day of March, 1939.

W. MARVIN SMITH

(Seal) *Notary Public, District of Columbia.*

My commission expires June 24, 1939.

345 Endorsed: Filed Mar 24 1939

In the District Court of the United States for the District of Columbia

Civil Action, File No. 1839

LUKENS STEEL COMPANY, a corporation, ALAN WOOD STEEL COMPANY, a corporation, SOUTH CHESTER TUBE COMPANY, a corporation, CENTRAL IRON & STEEL COMPANY, a corporation, HARRISBURG STEEL CORPORATION, a corporation, THE EASTERN ROLLING MILL COMPANY, a corporation, and ATLANTIC WIRE COMPANY, a corporation, *Plaintiffs,*

—against—

FRANCES PERKINS, individually and as Secretary of Labor of the United States, CHARLES V. McLAUGHLIN, individually and as Assistant Secretary of Labor of the United States, L. METCALFE WALLING, individually and as Administrator of the Division of Public Contracts of the Department of Labor of the United States, HENRY MORGENTHAU, JR., individually and as Secretary of the Treasury of the United States, CHRISTIAN JOY PEOPLES, individually and as Director of the Procure-

ment Division of the Department of the Treasury of the United States, CLAUDE AUGUSTUS SWANSON, individually and as Secretary of the Navy of the United States, HARRY HINES WOODRING, individually and as Secretary of War of the United States, HAROLD L. ICKES, individually and as Secretary of the Interior of the United States, and JAMES A. FARLEY, individually and as Postmaster General of the United States, *Defendants.*

DISTRICT OF COLUMBIA, *ss.:*

M. L. Ring, Commander, S. C., being duly sworn on oath, states that he is Purchasing Officer of the Bureau of Supplies and Accounts of the Navy Department; that he supervised the issuance of invitations to bid, the opening of bids, and the awarding of contracts pursuant to Navy
346 Schedules 5681 and 5682 to which the temporary restraining order issued by the court in the above-entitled proceeding on February 28, 1939 related; that Navy Schedule 5681, constituting an invitation to bid, was issued by the Bureau of Supplies and Accounts of the Navy Department on February 15, 1939, and, as issued, contained the representations and stipulations required by Public Act No. 846, 74th Congress, which representations and stipulations included the determination of the Acting Secretary of Labor, dated January 16, 1939, in respect of the prevailing minimum wages for persons employed in the manufacture or furnishing of the products of the iron and steel industry; that three contracts were awarded pursuant to said Navy Schedule 5681; that bids for certain items specified in said Navy Schedule 5681 were filed by Bethlehem Steel Company, Carnegie-Illinois Steel Corporation and Jones & Laughlin Steel Corporation; that the bid of the Bethlehem Steel Company was made subject to the condition that the representations and stipulations requiring compliance with the determination, dated January 16, 1939, issued by the Acting Secretary of Labor, would be inoperative in the performance of, and should not apply to any contract that might be awarded to said Bethlehem Steel Company pursuant to such bid; that both the Jones & Laughlin Steel Corporation and Carnegie-Illinois Steel Corporation agreed to the above-mentioned representations and stipulations; that the Carnegie-Illinois Steel

Corporation was the lowest bidder for certain specified items called for by said Navy Schedule 5681; and that the contract for said items was awarded to said Carnegie-Illinois Steel Corporation; that bids for certain other
347 items specified in said Navy Schedule 5681 were filed by Bethlehem Steel Company, Carnegie-Illinois Steel Corporation, Joseph P. Cattie & Brothers, Penn Galvanizing Company, Enterprise Galvanizing Company, Thomas Gregory Galvanizing Company, Jones & Laughlin Steel Corporation, and Ross Galvanizing Company; that the bid of the Bethlehem Steel Company was made subject to the condition referred to above; no other bidder excepted to the above-mentioned representations and stipulations; that the Ross Galvanizing Company was the lowest bidder for such items specified in said Navy Schedule 5681; and that the Contract for said items was awarded to said Ross Galvanizing Company; that bids for certain other items specified in said Navy Schedule 5681 were filed by Bethlehem Steel Company, Carnegie-Illinois Steel Corporation, Joseph P. Cattie & Brothers, Penn Galvanizing Company, Enterprise Galvanizing Company, Thomas Gregory Galvanizing Company, Jones & Laughlin Steel Corporation, and Ross Galvanizing Company; that the bid of the Bethlehem Steel Company was made subject to the condition referred to above; that no other bidder excepted to the above-mentioned representations and stipulations; that the Penn Galvanizing Company was the lowest bidder for such items specified in said Navy Schedule 5681; and that the contract for said items was awarded to said Penn Galvanizing Company; that two contracts were awarded pursuant to Navy Schedule 5682; that bids for certain items specified in Navy Schedule 5682 were filed by Bethlehem Steel Company, Carnegie-Illinois Steel Corporation, Lebanon Steel and Iron Company; that the bid of the Bethlehem Steel Company was made subject to the condition that the representations and stipulations requiring compliance with the determination dated January 16, 1939, issued by the
Acting Secretary of Labor, would be inoperative in
348 the performance and should not apply to any contract that might be awarded to said Bethlehem Steel Company pursuant to such bid; that both the Carnegie-Illinois Steel Corporation and the Lebanon Steel and Iron Company agreed to the above-mentioned representations

and stipulations; that the Carnegie-Illinois Steel Corporation was the lowest bidder for such items specified in said Navy Schedule 5682; and that the contract for said items was awarded to said Carnegie-Illinois Steel Corporation; that bids for certain other items specified in Navy Schedule 5682 were filed by Carnegie-Illinois Steel Corporation, Joseph P. Cattie & Brothers, Penn Galvanizing Company, Enterprise Galvanizing Company, Thomas Gregory Galvanizing Company, Ross Galvanizing Company, and Southern Galvanizing and Plating Company; none of the bidders excepted to the above-mentioned representations and stipulations; that the Ross Galvanizing Company was the lowest bidder for such items specified in said Navy Schedule 5682; and that the contract for said items was awarded to said Ross Galvanizing Company; that no persons, other than those hereinabove referred to, submitted bids pursuant to said Navy Schedules 5681 or 5682.

Affiant further states that Navy Schedule 900/2380, constituting an invitation to bid, was issued by the Bureau of Supplies and Accounts on February 10, 1939, and Navy Schedule 900/2381, constituting an invitation to bid, was issued by the Bureau of Supplies and Accounts of the Navy Department on February 11, 1939, and that each of said Schedules, as issued, contained representations and stipulations pursuant to Public Act No. 846, 74th Congress, which representations and stipulations included the determination, dated January 16, 1939, issued by the Act-
349 ing Secretary of Labor, in respect of the prevailing minimum wages for persons employed in the manufacture or furnishing of the products of the iron and steel industry; and that all other Schedules constituting invitations to bid on contracts subject to the provisions of Public Act No. 846, 74th Congress, for the manufacture or furnishing of the products of the iron and steel industry subject to the determination of the Acting Secretary of Labor, dated January 16, 1939, bids on which are to be opened on or after March 1, 1939, as issued, include the representations and stipulations in respect of the prevailing minimum wages for persons employed in the manufacture or furnishing of the products of the iron and steel industry as determined by the Acting Secretary of Labor on January 16, 1939.

M. L. RING,

Subscribed and sworn to before me this 6th day of March, 1939.

(Seal) RITA MARIE SULLIVAN

350 In the District Court of the United States for the District of Columbia

LUKENS STEEL COMPANY, ET. AL., *Plaintiffs*,

—against—

FRANCES PERKINS, ET. AL, *Defendants*.

Civil Action File No. 1839

Filed March 24, 1939

Defendants' Cross-Designation of Record on Appeal

The defendants respectfully request this Court to direct and order the Clerk of this Court to prepare the record on appeal and, under his hand and the seal of this Court, to transmit to the Court of Appeals of the District of Columbia a true copy of the matter designated by the parties, by excluding therefrom the papers and proceedings designated in the plaintiffs' "Praecipe and Designation of Record" filed March 15, 1939 herein which are designated and numbered 2, 3, 4, 5, 6, 7, 13, 14, 15, 16, 17, 18, 19, and 22, and by including the additional following papers and proceedings:

(1) This Cross-designation of Record;

(2) The order of this Court upon the Designation and Cross-designation settling and determining the contents of the record on appeal.

EDWARD J. ENNIS
Attorney for defendants.

Receipt of copy of the foregoing Cross-designation of Record is hereby acknowledge this 16th day of March, 1939.

ROBERTS B. THOMAS
Attorney for plaintiffs.

351 In the District Court of the United States for the District of Columbia

LUKENS STEEL COMPANY, ET. AL., *Plaintiffs,*

—against—

FRANCES PERKINS, ET. AL, *Defendants.*

Civil Action File No. 1839

Filed March 24, 1939

Defendants' Cross-Designation of Record on Appeal

The defendants respectfully request this Court to direct and order the Clerk of this Court to prepare the record on appeal and, under his hand and the seal of this Court, to transmit to the Court of Appeals of the District of Columbia a true copy of the matter designated by the parties, by including therein, in addition to the orders and proceedings designated in the plaintiffs' "Praecipe and Designation of Record" filed March 15, 1939, the following additional papers and proceedings:

(1) Affidavit of Edward J. Ennis served on the attorneys for plaintiffs on March 6, 1939, and filed on March 24, 1939;

(2) Affidavit of M. L. Ring served on the attorneys for the plaintiffs on March 8, 1939 and filed on March 24, 1939.

(3) This Cross-designation of Record;

(4) The order of this Court upon the Designation and Cross-designation settling and determining the contents of the record on appeal.

EDWARD J. ENNIS,
Attorney for defendants.

Receipt of a copy of the foregoing Cross-designation of Record is hereby acknowledged this 17th day of March, 1939.

ROBERTS B. THOMAS
Attorney for plaintiffs.

Endorsed on Cover: No. 7368. Lukens Steel Co. et al. Appellants, vs. Perkins et al., United States Court of Appeals for the District of Columbia Filed Mar 17 1939. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 3056

LUKENS STEEL COMPANY, A CORPORATION; ALAN WOOD STEEL COMPANY, A CORPORATION; SOUTH CHESTER TUBE COMPANY, A CORPORATION; CENTRAL IRON & STEEL COMPANY, A CORPORATION; HARRISBURG STEEL CORPORATION, A CORPORATION; THE EASTERN ROLLING MILL COMPANY, A CORPORATION; AND THE ATLANTIC WIRE COMPANY, A CORPORATION, PETITIONERS-APPELLANTS.

vs.

FRANCIS PERKINS, INDIVIDUALLY AND AS SECRETARY OF LABOR OF THE UNITED STATES; CHARLES V. MCLAUGHLIN, INDIVIDUALLY AND AS ASSISTANT SECRETARY OF LABOR OF THE UNITED STATES; L. METCALF WALLING, INDIVIDUALLY AND AS ADMINISTRATOR OF THE DIVISION OF PUBLIC CONTRACTS OF THE DEPARTMENT OF LABOR OF THE UNITED STATES; HENRY MORGENTHAU, JR., INDIVIDUALLY AND AS SECRETARY OF THE TREASURY OF THE UNITED STATES; CHRISTIAN JOY PEOPLES, INDIVIDUALLY AND AS DIRECTOR OF THE PROCUREMENT DIVISION OF THE DEPARTMENT OF THE TREASURY OF THE UNITED STATES; CLAUDE AUGUSTUS SWANSON, INDIVIDUALLY AND AS SECRETARY OF THE NAVY OF THE UNITED STATES; HARRY HINES WOODRING, INDIVIDUALLY AND AS SECRETARY OF WAR OF THE UNITED STATES; HAROLD L. ICKES, INDIVIDUALLY AND AS SECRETARY OF THE INTERIOR OF THE UNITED STATES; AND JAMES A. FARLEY, INDIVIDUALLY AND AS POSTMASTER GENERAL OF THE UNITED STATES, RESPONDENT-APPELLEES.

Appeal Record Docketed in No. 7368

United States Court of Appeals for the District of Columbia. Filed Mar. 17, 1939. Joseph W. Stewart, Clerk.

Petition for temporary injunction pending final hearing and determination of this cause on appeal

The petitioners-appellants Lukens Steel Company, Alan Wood Steel Company, South Chester Tube Company, Central Iron & Steel Company, Harrisburg Steel Corporation, The Eastern Rolling Mill Company, and The Atlantic Wire Company (hereinafter referred to as petitioners) petition and move this Honorable Court to issue a temporary injunction as set forth in the proposed form of order annexed hereto as Schedule A, to wit, a temporary injunction, in substance restraining, pending final determination of petitioners' appeal:

(a) Respondents Perkins, McLaughlin, and Walling, individually and in their respective official capacities as Secretary of Labor, Assistant Secretary of Labor, and Administrator of the Division of

Public Contracts of the Department of Labor, from continuing in effect and holding out as effective a Determination dated January 16, 1939, and effective March 1, 1939 (hereinafter called the Determination), which respondent McLaughlin (acting with the approval and participation of respondent Perkins) purported to make pursuant to the Public Contracts (Walsh-Healey) Act [1] and which fixes the minimum wages which members of the Iron and Steel Industry who desire to bid on contracts to be let by agencies of the United States must agree to pay to employees engaged in the performance thereof; and

(b) Respondent Peoples, individually and as Director of the Procurement Division of the Department of the Treasury, and the remaining respondents, individually and in their respective official capacities, from giving effect to the Determination in the bidding upon and award of public contracts for the manufacture or furnishing of products of the Iron and Steel Industry; and to grant the opportunity of oral argument on said petition and, in support of said petition, show to the Court the following:

I. Summary Statement of the Nature of the Action; the Decision of the Court Below; and the Necessity for Relief Pending Determination of Appeal

Because of—

(a) The great public importance of this cause, and

(b) The impelling necessity for a stay pending determination on appeal to avoid—

(i) Irreparable injury to petitioners so grave as to impair substantially, if not completely, the effect of an ultimate determination in their favor, and

(ii) The confusion with respect to, and probable illegality of, all contracts let by Goverment agencies for iron and steel products, including those required for the Government's rearmament program, which will otherwise result, petitioners are filing a more detailed petition and exhaustive memorandum in support thereof than is customary, and are also requesting oral argument.

A brief summary, amplified in succeeding portions of the petition and in such memorandum, of the nature of the cause, the decision of the Court below and the necessity for relief pending appeal is as follows:

1. Petitioners, seven of the smaller Eastern producers of iron and steel products (Ex. 1,[2] Pars.[3] 3–10A), commenced this action prior to the effective date (March 1, 1939) of the Determination, the valid-

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[1] Act of Congress approved June 30, 1936; Public—No. 846—74th Cong.; 49 Stat. 2036–2039, c. 881.

[2] All exhibits filed herewith are made a part hereof. Such exhibits are numerous and are bound, indexed and filed under separate cover for the convenience of the Court. Such exhibits include all material portions of the record on appeal now in course of preparation.

[3] Paragraph references throughout are to the Complaint (Exhibit 1 hereto) unless otherwise stated.

ity of which they challenge, by filing their Complaint for Injunction and Declaratory Judgment in the District Court of the United States for the District of Columbia on February 25, 1939. In the Complaint (Prayer, Pars. 1–5) they prayed for a temporary restraining order, preliminary injunction and final injunction enjoining the respondents from causing or permitting the Determination to become effective and from giving any effect whatsoever thereto, as well as a declaratory judgment that the Determination is invalid and void as having been made without the authority of the Public Contracts Act. A copy of the Complaint, as amended,[1] (herein called the Complaint) is filed herewith as Exhibit 1.

2. After first having granted a limited form of temporary restraining order on February 28, 1939 (Exhibit 20), the Court below (Mr. Justice Bailey), on motion of respondents (Exhibit 25), dismissed the Complaint, on March 14, 1939 (Exhibit 27), and for that reason refused to rule upon or grant petitioners' motion for preliminary injunction (Exhibit 3). At the same time, stay pending appeal was denied (Exhibit 27).

3. Petitioners have noticed an appeal from such dismissal and refusal (Exhibit 28), have filed their assignment of errors (Exhibit 29) and designation and are diligently taking, and will continue to take, all steps necessary to perfect such appeal at the earliest opportunity.

4. Unless the stay sought herein is granted, petitioners, having already suffered irreparable injury as a result of the invalid Determination and the enforcement thereof (see pages 19 to 21, *infra*) will, pending appeal, suffer further irreparable injury of a character which may be so grave as to render an ultimate determination in their favor of limited benefit. Invitations to bid on numerous large and important contracts for iron and steel products in connection with the Government's rearmament program, and otherwise, are to be issued within the near future by various Government agencies (see pages 16 to 18, *infra*). Unless the requested stay is granted, petitioners will be unable to submit bids which will receive consideration without agreeing therein to comply with the Determination which they contend is illegal.

Moreover, if the Determination is invalid, as claimed by petitioners, and such stay is not granted, *all* contracts awarded pursuant to such invitations and containing provisions for payment of minimum wages required by the Determination will be illegal, or, at best, of doubtful validity.

On the other hand, grant of the stay sought will in no way impair or interfere with the conduct of public business. It will merely permit public contracts of unquestioned validity for iron and steel

[1] The Complaint was amended pursuant to an order granting appropriate leave, a copy of which is filed herewith as Exhibit 2. For the convenience of the Court, the amendments (which amend paragraphs 3, 9, 51, 52, 55, 58, and 60 of the Complaint, as originally filed, and add a new paragraph 10A) have been indicated on the copy of the Complaint filed herewith as Exhibit 1.

products to be awarded, *pendente lite*, without stipulations requiring compliance with the Determination, just as such contracts have been awarded over the years (and more particularly since June 30, 1936, the date of passage of the Public Contracts Act, which the authors of the Determination claim authorized its issuance).

The stay sought will not involve any increased cost to the Government; on the contrary, it will arrest the tendency towards monopoly created by the Determination. (See pages 17–18, 19–20, *infra*.) The Iron and Steel Industry is one in which workers are well paid (see pages 8 and 28, *infra*). Consequently, no impelling public interest will be served by denying the stay sought pending final adjudication of the validity of the Determination, the legality of which is now indisputably shrouded in doubt.

II. The Invalidity of the Determination

5. Except as otherwise expressly provided by law, neither any agency of the United States, nor any contracting officer acting on behalf thereof, may lawfully insert in any contract for materials or equipment any provision requiring any contractor to pay to any person employed in the performance of such contract any particular rate of wages. (Par. 21.)

6. The Public Contracts Act (hereinafter sometimes called the Act) provides, *inter alia*, in substance, that in any contract made by any agency of the United States for the manufacture or furnishing of materials or equipment in any amount exceeding $10,000, there shall be included a representation and stipulation "That all persons employed by the contractor * * * in the performance of the contract will be paid * * * not less than the minimum wages as determined by the Secretary of Labor to be the PREVAILING MINIMUM WAGES for persons employed on similar work or in the particular or similar industries or groups of industries currently operating IN THE LOCALITY IN WHICH THE MATERIALS * * * or equipment ARE TO BE MANUFACTURED OR FURNISHED UNDER SAID CONTRACT * * *" (Sec. 1 (b).) "Provided, however, That the provisions [of the Act] requiring the inclusion of representations with respect to minimum wages shall apply only to * * * contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor." (Sec. 11.) [Emphasis added.]

7. The Determination purported to divide the United States into six areas, designated as "LOCALITIES," and to determine the prevailing minimum wages for persons employed in the manufacture or furnishing of the products of the Iron and Steel Industry therein. (Pars. 44, 45.) A copy of the Determination is annexed as Exhibit E to the Complaint.

The Determination was by its terms to become effective on January 31, 1939 (Par. 44), but the effective date was subsequently extended to March 1, 1939.[5] (Par. 47.)

8. The Determination states that "in the LOCALITY consisting of Ohio, Pennsylvania, Delaware, Maryland, Kentucky, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire and Maine, and that portion of the State of West Virginia comprised within the counties of Hancock, Brooke, Ohio, Marshall, Harrison, and Monongalia, and the District of Columbia," the prevailing minimum wage is determined to be 62½ cents per hour. (Par. 44.)[6] [Emphasis added.]

9. Petitioners operate plants in the following "LOCALITIES": Coatesville, Ivy Rock, Conshohocken, Swedeland, Chester and Harrisburg, Pennsylvania; Colgate, Maryland; and Branford, Connecticut. (Pars. 3–10A.) The minimum wages paid by them vary, depending on the particular petitioner and the particular LOCALITY in which its plant is situated, from 52½ cents to 56½ cents per hour. (Ibid.) In four instances such minimum wages are paid pursuant to agreements with either the Steel Workers Organizing Committee (affiliated with the C. I. O.) or the Amalgamated Association of Iron, Steel, and Tin Workers of North America (affiliated with the A. F. of L.) (Pars. 3, 4, 5, 8.)

10. Under guise of construction of the term "locality," the Determination attempts to raise wages, by FIXING minimum wages NEVER THERETOFORE EXISTING, in the several localities in which petitioners' plants are situated, instead of ASCERTAINING what in fact are the minimum wages currently paid and ACTUALLY PREVAILING in such localities, as required by the Act. Such wage raising and fixing were sought to be accomplished by—

(i) Including such localities in a large region also embracing Pittsburgh, Youngstown, and other localities to the west in which, because of various geographical advantages enjoyed by the plants situated therein, the prevailing minimum wages for iron and steel workers are higher than those in the localities in which petitioners' plants are situated, and

(ii) Labeling such large region, consisting of 13 States, part of a fourteenth, and the District of Columbia, a "locality" within the meaning of the Act. (Pars. 51, 61 (iv).)

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[5] Since the filing of the Complaint, respondents Perkins and McLaughlin have, in accordance with prior threats (Pars. 48, 56, 57, 59), made the Determination effective, except to the extent restrained by the temporary restraining order issued by the District Court on February 28, 1939 (Exhibit 20), and now dissolved.

[6] In the other five so-called "localities," viz. the "southern area" consisting of 12 states and part of a thirteenth (Comp., Ex. E, p. 10), the 3 west "coastal states" (Ibid, p. 12), the 8 "mountain states" (Ibid, p. 12) the 7 "remaining states east of the mountain states and west of the Mississippi" and the area about East Saint Louis, Illinois (Ibid, p. 13), and the 4 states in the "area immediately to the east of the trans-Mississippi locality" (Ibid, p. 14), the hourly prevailing minimum wages are determined to be 45 cents, 60 cents, 60 cents, 58½ cents and 62½ cents, respectively (Ibid, p. 18; Par. 44).

11. The Determination is void:

(a) The term "locality," as employed in Section 1 (b) of the Act, means the city, county, village, or other civil subdivision of a State in which work under a particular Government contract is to be performed, or the immediate vicinity of that place, or, at most, a narrowly restricted geographical area. (Par. 50.) This conclusion is compelled by the ordinarily accepted usage of the term, the context in which it is employed in the Act, the purpose the Act was designed to accomplish, the reports of Congressional committees thereon, the statements of its proponents in the Congressional debates and the grave constitutional doubts that would arise from the contrary construction adopted in the Determination which would confer unguided legislative authority on the Secretary of Labor.

The 62½-cent minimum wage established in the Determination is not the prevailing minimum wage, in the Iron and Steel Industry, in or in the immediate vicinity of any city, county, village, or other State civil subdivision in which any of the plants of the petitioners are located, or in any small geographical area surrounding any such plant or city, county, village or other State civil subdivision.[1] (Par. 51; Comp. Ex. G.)

In fact, 62½-cent minimum wage is paid only 1 plant and to only 8 employees in all the cities, counties, villages, and other State civil subdivisions in which plants of the petitioners are located. (Comp. Ex. G.).

Indeed, a minimum wage rate lower than 62½ cents per hour is paid by all but 3 plants (operated by 1 company employing 115 common laborers) out of a total of 60 plants employing 5,541 common laborers located in the communities within the entire area comprising the New England States and the States of Delaware, New Jersey, and Maryland; that part of the States of New York and Pennsylvania lying east of a line drawn north and south through the most easterly point of Altoona, Pennsylvania; and that part of the State of West Virginia lying south of a line drawn west in extension of the southerly boundary of the State of Pennsylvania. (Par. 52.) The plants of all petitioners are situated in communities in such area.

(b) The term "locality" as employed in Section 1 (b) of the Act was interpreted in the Determination by respondent McLaughlin as embracing any area, however large, which the Secretary of Labor might choose in the light of economic factors as a region within which to determine prevailing minimum wages in the Iron and Steel

[1] The wage statistics set forth herein and in the Complaint are taken from the Findings of Fact, Conclusions and Recommendations of the Public Contracts Board for the Consideration of the Secretary of Labor dated October 27, 1938 (hereinafter called the Report), a copy of which is annexed as Exhibit B to the Complaint. The Public Contracts Board held what it called a "hearing" prior to rendering the Report. (Pars. 30–39.) The respondent McLaughlin in making the Determination accepted and relied on the findings of fact (including the findings in respect of wage data) set forth in the Report. (Par. 51.)

ndustry. (Par. 50.) This constituted a plain error of law. (Ibid.) he entire Determination—was predicated on such construction. Ibid.)

(c) Even if the construction of the Act adopted by respondent lcLaughlin as aforesaid be correct, the Determination is, neverthe-ss, arbitrary and capricious and, therefore, invalid, since—

(i) The only so-called "economic factor" referred to in the De-rmination to justify the selection of the 13 States, a portion of a urteenth, and the District of Columbia, as the single "locality" in hich petitioners' plants are located, is the alleged fact (denied by etitioners) that a single market area is predominantly served by e plants in the Iron and Steel Industry located in such area. In iving controlling significance to such alleged fact, respondent Mc-aughlin, in effect, converted the Act into one authorizing the fixing f equal wages for persons employed by manufacturers (wherever cated) who market their products in the same area, as distinguished rom one authorizing the ascertainment of prevailing minimum ages in localities in which goods are produced. (Par. 52 (a).)

(ii) The Determination completely and erroneously ignores and ils to give effect to the undisputed fact that there are and have en for many years well-defined geographical wage differentials in ch area comprising 13 States, a portion of a fourteenth and the istrict of Columbia. (Par. 52 (b).) Both the express language of he Act and its legislative history show that the Secretary of Labor as given no power to eliminate geographic wage differentials. Such ifferentials are the composite result of the interaction of a large umber of economic factors and forces, and the Determination itself Comp. Ex. E, pp. 10–14) expressly states or impliedly recognizes, n selecting each of the five other so-called "localities" set up thereby, hat such geographical wage differentials are factors of great, if not ontrolling, importance in determining the area to be included within ny "locality" for the purposes of the Act.

The well-recognized and long-existing wage differentials between he plants in the Iron and Steel Industry which are located in the estern portion (hereinafter sometimes called the Western District) f the so-called "locality" found to be comprised of 13 States, a por-ion of a fourteenth, and the District of Columbia, as aforesaid, and hose plants which were included by respondent McLaughlin in said locality," but which are also located in what are known in the In-ustry as the "Eastern District" (as in the case of petitioners' lants), the "Buffalo District" and the "Johnstown District," are hown by the following tabulation based on undisputed wage data aken from the Report of the Public Contracts Board (see Para-raph 52 of the Complaint and Exhibit G thereto):

	No. of plants	No. of wage earners	No. of common laborers
Eastern district—base rates:			
Under 56½¢	32	8,522	1,35
Exactly 56½¢	18	38,069	4,89
Over 56½¢ but under 62½¢	7	4,200	27
Exactly 62½¢	3	3,602	11
Over 62½¢			
	60	54,393	5,5
Buffalo district—base rates:			
Under 56½¢	4	1,412	17
Exactly 56½¢			
Over 56½¢ but under 62½¢	5	9,467	81
Exactly 62½¢			
Over 62½¢			
	9	10,879	98
Johnstown district—base rates:			
Under 56½¢			
Exactly 56½¢			
Over 56½¢ but under 62½¢	2	8,886	63
Exactly 62½¢			
Over 62½¢			
	2	8,886	63
Western district—base rates:			
Under 56½¢	6	4,909	87
Exactly 56½¢	1	53	2
Over 56½¢ but under 62½¢	3	973	3
Exactly 62½¢	91	149,319	10,36
Over 62½¢	1	501	6
	102	155,755	11,46
Total of such districts—base rates:			
Under 56½¢	42	14,843	2,36
Exactly 56½¢	19	38,122	3,97
Over 56½¢ but under 62½¢	17	23,526	1,09
Exactly 62½¢	94	152,921	10,65
Over 62½¢	1	501	6
	173	229,913	18,09

(d) Petitioners were not accorded the fair and impartial hearing by the Secretary of Labor, or an impartial representative designated by him, to which they were entitled under the Act, and particularly Section 5 thereof. (Pars. 26, 55.)

III. The Irreparable Injury Already Suffered by Petitioners and That Which Will Be Suffered if a Stay Is Denied

12. The respondents Perkins, McLaughlin and Walling have ruled that every contract by an agency of the United States for the manufacture or furnishing of iron and steel products, of a value of more than $10,000, entered into after March 1, 1939 (whether or not let pursuant to invitations to bid issued prior to said date) is covered by the Determination. Purporting to act pursuant to Section 4 of the Act, respondent Perkins has adopted a regulation (No. 504, Art. 1) requiring, in effect, that every invitation to bid on any such contract and every bid shall contain a stipulation binding the bidder to comply with the Determination. (Pars. 56, 57.)

13. Respondent Peoples, as Director of the Procurement Division, has directed, and intends to continue to direct, every such agency

desiring to enter into any such contract to include such a stipulation in such contract and the invitations to bid thereon, and to require the inclusion of such a stipulation in all bids thereon. (Par. 56.)

Respondents Morgenthau, Swanson, Woodring, Ickes, and Farley, unless restrained, intend to, and will, require the insertion of such stipulation in every such contract subject to their supervision or control, and in all invitations to bid and bids thereon. (Par. 59.)

14. Invitations to bid and required forms of bids, issued by various units of the Department of the Navy, contain and require such stipulations. (Par. 58; Ex. 4, 5.) Other agencies of the United States have taken similar action. (Ex. 16, 17.)

15. By reason of the foregoing, the petitioners are placed now, as they were at the time of institution of suit (see pages 19 to 21, *infra*), in a legal and practical dilemma which will result in their suffering the gravest and most immediate and irreparable injury.

For the most part, they have been profitably selling iron and steel products to agencies of the United States for many years. (Pars. 3-10A.) Some of them are presently engaged in performance of contracts with such agencies for the sale of substantial amounts of such products. (Pars. 3, 4.)

Officials of the Navy Department have recently stated that invitations to bid would be issued in the near future on proposed contracts covering iron and steel products. (Ex. 12, 14.) Moreover, the issuance of invitations to bid on numerous large and important contracts for such products by other agencies of the United States, including the War Department, the Treasury Department, the Department of the Interior, and the Post Office Department, is expected within the immediate future. (Par. 60; Ex. 11.) Until issued, all such invitations are, of course, confidential, and the exact date of issue cannot, therefore, be stated at this time. However, the Court will take judicial notice of the fact that the various departments of the Government are continually issuing invitations to bid on iron and steel products and particularly in connection with the present well-known and advertised defense and public works programs.

Petitioners are desirous of bidding on such contracts and respectively intend, if the Determination is not continued in effect, to bid on such thereof as shall pertain to products manufactured and sold by them respectively. (Par. 60; Ex. 11, 12, 14.)

If the Determination shall be permitted to remain in effect, *pendente lite*, the petitioners will be unable, during such time, due to the illegal action taken and threatened by the respondents as aforesaid, to submit any bids on such contracts which will receive consideration in the award thereof unless they stipulate that they will pay minimum wages of 62½ cents an hour to all employees engaged in the performance thereof. (Par. 62 (i).)

If, however, they bid upon, and enter into, any such contracts containing such stipulations, they will not only have been deprived

of their lawful right to bid upon Government contracts, free of any limitations other than those imposed by Congress, but will be in danger of being estopped to secure a judicial decision as to the invalidity of the Determination. Moreover, the penalties provided in the Act (Sections 2 and 3) for noncompliance with any such stipulation (including heavy "liquidated damages," contract cancellation and blacklisting from Government business for three years) would present such hazards as to deter them from failing to comply with the unlawful Determination in order to test its validity. (Par. 61 (ii).)

Furthermore, petitioners, as a practical matter, in bidding under such circumstances, would be required to bid at prices sufficiently high to permit payment of the wages fixed by the Determination, or to court financial ruin. But, if they bid at such prices, they will presumably be unable to compete successfully with large, fully integrated companies having plants in more favorable geographical positions in the West and South whose wage rates are not increased by the Determination. (Par. 61 (iv): Ex. 4, 5, 6, 7, 8, 9, 10.)

The natural consequences of allowing the Determination to continue in effect, therefore, will be to drive petitioners out of competition for Government business and to create a monopoly thereof in favor of the large, fully integrated companies. (Ibid.)

But even if, as a practical matter, petitioners could, pending appeal, obtain the award of such contracts containing such stipulation, the effect thereof would be, substantially, to make petitioners' appeal herein moot. An increase in the present minimum wages paid by petitioners to common laborers employed in the performance of such contracts would, from a practical standpoint, necessitate a corresponding increase in the wage rates for all classes of wage earners employed, and all classes of work done, by petitioners. (Par. 61 (iii), 4–9.) Consequently, the effect of taking Government contracts under existing circumstances would not only be to afford a basis to the Secretary of Labor for a redetermination and finding that the prevailing minimum wages paid in the localities in which petitioners' plants are located are 62½ cents an hour, but would also endanger petitioners' standing in Court in that the primary grievance of which they complain, viz, that the Determination unlawfully requires payment of wages in excess of those which they are now paying, would disappear.

The granting of the relief prayed herein is, therefore, necessary both to prevent immediate and irreparable injury from being suffered by the petitioners and to preserve the appellate jurisdiction of this Court.

16. As shown by the facts hereinafter set forth, petitioners have already suffered great and irreparable injury as a result of the Determination and the enforcement thereof by respondents as aforesaid.

17. The Complaint alleged (Par. 58) that between March 1, 1939, and March 10, 1939, bids theretofore invited on contracts for the

manufacture of iron and steel products for very substantial amounts were scheduled to be opened by the Navy Department, with a view to awarding contracts thereon; that petitioners Lukens Steel Company (hereinafter called Lukens), Alan Wood Steel Company (hereinafter called Alan Wood), and Central Iron and Steel Company (hereinafter called Central), desired to bid, and if the Determination did not become effective, would bid on one of such contracts (Schedule 5681); and that some or all of the plaintiffs desired to, and if the Determination did not become effective would, submit bids on some or all of the other contracts referred to.

18. The temporary restraining order issued by the Court below on February 28, 1939 (Ex. 20), did not enjoin respondents from making the Determination effective (as prayed in the Complaint), except in a limited manner which, for reasons hereinafter more fully set forth (pp. 25, 26, *infra*), did not accord to petitioners, or any of them, relief sufficient to permit them to bid on such proposed contracts.

19. On March 2, 1939, the bids on one of such contracts, Schedule No. 5681 of the Bureau of Supplies and Accounts of the Department of the Navy, covering approximately 7,375 tons of steel plates, sheet and strip, were opened. Carnegie-Illinois Steel Company, a large integrated steel producer in the Pittsburgh area, submitted the lowest of only three bids, and was awarded the contract, for the black (or nongalvanized) plates covered by said proposed contract. The estimated value of said contract is $350,000. Central, Alan Wood, and Lukens would have bid upon said schedule No. 5681 had the temporary relief prayed in the Complaint been granted. Petitioner Central Iron & Steel Company had prepared and would have submitted a bid actually lower than that of the Carnegie-Illinois Steel Company above referred to. (Ex. 11–14.)

20. Because of the failure and refusal of the Court below to grant the temporary relief prayed in the Complaint, Alan Wood was prevented from bidding on the proposed contract, Schedule No. 7447, of the Mare Island Navy Yard of San Francisco, California, bids on which were opened on March 6, 1939; petitioner The Eastern Rolling Mill Company was prevented from bidding on a proposed contract, Schedule No. 5748, of the Bureau of Supplies and Accounts of the Department of the Navy, the bids on which were opened on March 14, 1939; and Central and Alan Wood were prevented from bidding on a proposed contract, Schedule No. 3433, issued by the General Purchasing Officer of the Panama Canal, bids on which were opened on March 15, 1939. (Ex. 12, 14, 11, 17.)

21. Alan Wood is in danger of losing the award, if it has not already lost the award, on a proposed contract, No. 33119–A, Schedule 1, of the Reclamation Bureau of the Department of the Interior, on which bids were opened *February 6, 1939* (22 days before the Determination became effective), by reason of the refusal of said petitioner to agree to comply with the Determination. (Ex. 16.)

IV. Petitioners' Right to Attack the Determination

22. As shown above, petitioners' right to bid and negotiate for Government contracts and to conduct their business relations with the Government free from illegal interference has been unlawfully invaded, and is threatened with further unlawful invasion, with attendant irreparable injury, by the respondents.

23. Respondents contended below that, however grievous the abuse of power by the Secretary of Labor and however great the damage inflicted on petitioners, they had no standing in Court because the right asserted by them as aforesaid was not one entitled to legal protection in any Court or in any type of action. This contention, shocking to the conscience, was not sustained by the Court below.

24. The authorities showing that petitioners have a legal right to bid upon and negotiate contracts with the Government, which is entitled to protection against unauthorized interference by administrative public officials, are set forth at length in the memorandum accompanying this petition. Stated in most summary fashion, petitioners' contentions in this regard are as follows:

(a) The right to bid for Government contracts is only one phase of the common law right of every person to conduct a legitimate business—pursue a legitimate calling—and in the conduct thereof to seek to sell the products or services of that business free from unjustifiable interference, restraint, and coercion by others.

(b) The Government has been a customer of all the petitioners save one and is now a party to contracts with several. The unauthorized action of the respondents, who are third parties vis-a-vis the petitioners and the Government, raises an unlawful barrier between the petitioners and their customer and unjustifiably interferes with the petitioners' right to negotiate contracts with that customer subject only to conditions imposed by it. In other words, although the Government (the customer), acting through powers constitutionally delegated to Congress, may, like any other customer, impose such conditions as it sees fit upon doing business with it, the respondents may not, any more than any other third party, interfere with or obstruct the petitioners in their efforts to do business with their customer.

(c) The statutes relating to bidding for Government contracts recognize and affirm the right of bidders to be free from unauthorized interference and restrictions in bidding therefor:

(i) The Public Contracts Act itself, by imposing certain conditions on the right to bid for Government contracts, excludes the imposition of conditions other than those prescribed.

(ii) Section 3709 of the Revised Statutes which, as interpreted, requires competitive bidding, after advertising, on public contracts and the award thereof to the lowest responsible bidder, likewise recognizes and confirms such right. The purpose of such statute would be utterly

defeated if prospective bidders were not protected in the exercise of their right to bid for Government contracts against arbitrary and illegal interference from administrative officers.

V. The Action of the Court Below and the Reasons Therefor

25. As stated above, the Court below (Mr. Justice Bailey), on motion of respondents, dismissed the Complaint on March 14, 1939 (Ex. 27), and, for that reason, refused to rule upon or grant petitioners' motion for preliminary injunction (Ex. 3).

26. At the same time, the temporary restraining order issued February 28, 1939, as thereafter extended, was dissolved and stay pending appeal was denied (Ex. 27).

27. Mr. Justice Bailey did not write an opinion stating the reasons for his action, nor did he make conclusions of law, as requested by petitioners. However, when announcing his decision from the bench, sustaining respondents' motion to dismiss, he assigned the following reasons, in substance therefor:

(1) It did not appear that the construction by the respondent McLaughlin in the Determination of the term "locality," as employed in the Act, was so *clearly erroneous* as to justify the intervention of a court; and

(2) It did not appear that the Determination was so *plainly arbitrary and capricious* as to justify the intervention of a court.

28. It is respectfully submitted that, for the reasons hereinabove outlined and more fully developed in the memorandum in support of this petition, Mr. Justice Bailey erred in concluding that the above-mentioned construction was not clearly erroneous and that the Determination was not plainly arbitrary and capricious. It is further submitted, however, that in erecting as tests for decision the criteria as to whether the Acting Secretary of Labor "clearly" erred as matter of law and was "plainly" arbitrary and capricious, the court below acted contrary to a long line of decisions by the Supreme Court of the United States.* Such decisions establish, it is believed, that if such respondent acted outside his statutory authority, or erred as matter of law, or, proceeding within his statutory authority, acted arbitrarily or capriciously, petitioners are entitled to the injunctive relief sought in the complaint.

29. In announcing from the bench that he would deny a stay pending appeal, Mr. Justice Bailey stated that, having dismissed the complaint, he felt that the proper forum for such application was this Court.

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* Waite v. Macy, 246 U. S. 606; American School of Magnetic Healing v. McAnnulty, 187 U. S. 94; Gegiow v. Uhl, 239 U. S. 3; Lloyd Sabaudo Societa Anonima per Azioni v. Elting, 287 U. S. 329, 335–336; United States v. Laughlin, 249 U. S. 440; United States v. United Verde Copper Co., 196 U. S. 207; Merritt v. Welsh, 104 U. S. 694; Morrill v. Jones, 106 U. S. 466; United States v. George, 228 U. S. 14, 21; Work v. Mosier, 261 U. S. 352, 359; Johnson v. Towsley, 80 U. S. 72. See also dissenting opinion of Mr. Justice Brandeis in Crowell v. Benson, 285 U. S. 22, 89–91.

VI. The Relief Requested

30. This Court, of course, has jurisdiction to issue a temporary injunction or restraining order pending appeal.[9] It has not hesitated to grant such relief when necessary to protect the appellants' rights, even though the Court below has denied an injunction.[10]

31. The injunction pending appeal sought herein is one, in substance, (a) restraining respondents Perkins, McLaughlin and Walling from continuing the Determination in effect, and (b) restraining the other respondents from giving effect thereto in the bidding upon and award of Government contracts for iron and steel products.

32. The foregoing is the only type of injunction which will preserve the *status quo ante* the Determination and accord to petitioners adequate relief against the irreparable injury which will otherwise be inflicted upon them by the Determination and its enforcement.

For example, temporary injunctive relief of the character embodied in the temporary restraining order issued by the Court below (Ex. 20), (towit, an injunction restraining only the Secretary of Labor and a named contracting officer or officers from giving effect to the Determination with respect to bids by certain petitioners on specified Government contracts) will not afford any real relief to petitioners. Such an injunction would create two classes of bidders on the contracts specified:

(1) A favored class, comprised of the particular petitioners named, who could submit bids without agreeing to abide by the Determination; and.

(2) Another class, comprised of the rest of the world, which could submit bids only with agreements to pay the wages specified in the Determination.

By creating such two classes of bidders, such an injunction would likewise create a situation wherein any contract awarded to the petitioners would either be illegal as in contravention of Section 3709 of the Revised Statutes (requiring competitive bidding, after advertising, on public contracts and the award thereof to the lowest responsible bidder)[11] or, at best, of doubtful validity.

33. An injunction as prayed is the only type of injunction that will prevent the chaotic situation in the award of Government iron and steel contracts which is now threatened. If the Determination is

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[9] Section 33 of Title 18 of The Code of the District of Columbia (Act of February 9, 1893, 27 Stat. 436, c. 74, sec. 11; Act of March 3, 1901, 31 Stat. 1227, c. 854, sec. 230) provides as follows:

"The said court of appeals shall have power to issue all necessary and proper remedial prerogative writs in aid of its appellate jurisdiction."

The Federal Rules of Civil Procedure do not in any way limit the power of this Court to grant such an injunction or restraining order.

[10] Bank of America v. Douglas et al., Original No. 3036, decided February 7, 1939; Utah Fuel Company v. National Bituminous Coal Commission, Original No. 2970; Hutchins Mutual Insurance Co. v. Hazen et al., Original No. 3006; Quinn v. Dougherty, No. 4773, decided November 17, 1928; Gritts v. Fisher, No. 2311, decided June 7, 1911; Oklahoma Utilities Company v. Ickes et al., No. 6509, decided July 9, 1935; Haskins Bros. & Co. v. Morgenthau et al., No. 6710, decided May 29, 1936.

[11] 20 Op. of At. Gen. 496, 499–500; 15 Dec. Comp. Gen. 944; 14 Dec. Comp. Gen. 518; 15 Dec. Comp. Gen. 846; Hannan v. Board of Education, 107 Pac. 676, 30 L. R. A. (N. S.) 14; Fones Bros. Hardware Co. v. Erb, 17 S. W. 7.

invalid, as claimed by petitioners, and either a limited injunction of the character granted by the court below is issued, or no injunctive relief is granted, all contracts awarded pending determination of this appeal which contain a stipulation requiring compliance with the Determination will be illegal, under R. S. Sec. 3709.

In the absence of express statutory authority, an executive department or officer may not lawfully include, in invitations for bids or contracts on Government work, any stipulation requiring the contractor to pay any specified wage rate to employees engaged in the performance of the contract (10 Dec. Comp. Gen. 301; Senate Report No. 1157, 74th Cong., 1st Sess.). To do so is to remove from competitive bidding an important element of cost and thus to defeat the purpose of R. S. Sec. 3709 requiring the award of Government contracts (except as otherwise expressly provided by law) to the lowest responsible bidder. (Ibid.) Consequently, any contract let under such circumstances is illegal. (Ibid.)

Issuance of the injunction prayed will permit the award of Government contracts for iron and steel free from the taint of illegality introduced by the Determination on March 1, 1939.

No public interest requires risking the impending confusion in the letting of public contracts which will result if the stay prayed is not granted. The effect of the stay prayed will be merely to continue the *status quo ante* the Determination which existed for many years. The Iron and Steel Industry is not sweatshop in character.[12] The Secretary of Labor himself waited more than two and one-half years before attempting to make effective any determination of minimum wages therefor under the Act. The time required for a decision on the validity of that determination will be only a fraction of that which the Secretary voluntarily permitted to pass before attempting to act.

The eminent desirability of avoiding the chaotic situation that would ensue from permitting the Secretary's Determination to become effective and cast the pall of illegality on all contracts containing provisions for compliance therewith was the very reason why petitioners instituted suit prior to the effective date of the Determination. It is not too late for this Court substantially to avoid that chaos. Few contracts have been let in the interim. But unless the Court now grants the temporary relief prayed by petitioners herein and compels the Secretary to take the action which he should in any event take voluntarily, the Government's entire rearmament and public-works program may be adversely affected.

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[12] For example, the minimum wages paid by petitioners are substantially above the average paid in other industries in the communities in which petitioners' plants are situated. (Pars. 3, 5; Ex. 4, 14, 12, 6, 7, 8.) In four instances such wage rates are paid pursuant to agreements with either the Steel Workers Organizing Committee or the Amalgamated Association of Iron, Steel and Tin Workers of North America. (Pars. 3, 4, 5, 8.)

Wherefore, showing the above, petitioners pray that a temporary injunction as set forth in the proposed form of order annexed hereto as Schedule A be issued pending appeal.

Dated March 16, 1939.

O. MAX GARDNER,
ROBERTS B. THOMAS,
FREDERICK H. KNIGHT,
Counsel for Petitioners-Appellants.

Copy received March 16, 1939.

EDWARD J. ENNIS,
Attorney for Defendants.

DISTRICT OF COLUMBIA, *ss.*:

Roberts B. Thomas, being first duly sworn, according to law upon oath deposes and says;

I am a citizen of the United States, over 21 years of age, and a resident of the County of Nassau, State of New York, and am an attorney duly admitted to practice in all the courts of the State of New York, the Supreme Court of the United States and the United States Court of Appeals for the District of Columbia. I am attorney for the petitioners-appellants named in the foregoing petition. All said petitioners-appellants are corporations and are absent from the District of Columbia. I have read the foregoing petition and verily believe the facts stated therein to be true.

ROBERTS B. THOMAS.

Subscribed and sworn to before me this 16th day of March, 1939

[NOTARIAL SEAL] EMMA NEAL MCQUEEN.
Notary Public, D. C.

My commission expires Oct. 15, 1941.

Schedule A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No.—

LUKENS STEEL COMPANY, *et al.*, PETITIONERS-APPELLANTS

vs.

FRANCES PERKINS, *et al.*, RESPONDENTS-APPELLEES

Injunction pending appeal

Upon consideration of the petition of petitioners-appellants Lukens Steel Company, Alan Wood Steel Company, South Chester Tube Company, Central Iron & Steel Company, Harrisburg Steel Corporation, The Eastern Rolling Mill Company, and The Atlantic Wire

Company (hereinafter referred to as the petitioners), filed herein March 16, 1939, it is adjudged, ordered and decreed that:

(a) Pending final determination of the appeal to this Court taken by petitioners from the judgment of the District Court of the United States for the District of Columbia which is referred to in said petition, respondents Frances Perkins, individually and as Secretary of Labor of the United States, Charles V. McLaughlin, individually and as Assistant Secretary of Labor of the United States, and L. Metcalfe Walling, individually and as Administrator of the Division of Public Contracts of the Department of Labor of the United States, and each of them, their and each of their officers, agents, assistants, employees, representatives, and attorneys, and anyone associated with or acting in concert or participation with them or any of them, and their successors in office, and each of them, and their offices, agents, assistants, employees, representatives and attorneys, and anyone associated with or acting in concert or participation with them or any of them, and each of them, be, and each of them hereby is, restrained and enjoined from continuing to promulgate, publish, or hold out, and from continuing to cause or permit to be promulgated, published or held out, as effective or valid or authorized by law, and from causing or permitting to be continued in effect, the Determination made under date of January 16, 1939, by respondent McLaughlin, as Acting Secretary of Labor, entitled "In the Matter of the Determination of the Prevailing Minimum Wages in the Iron and Steel Industry" (hereinafter called the Determination); and

(b) Pending final determination of the above-mentioned appeal, respondents Henry Morgenthau, Jr., individually and as Secretary of the Treasury of the United States, Christian Joy Peoples, individually and as director of the Procurement Division of the Department of the Treasury of the United States, Claude Augustus Swanson, individually and as Secretary of the Navy of the United States, Harry Hines Woodring, individually and as Secretary of War of the United States, Harold L. Ickes, individually and as Secretary of the Interior of the United States; and James A. Farley, individually and as Postmaster General of the United States, and each of them, their and each of their officers, agents, assistants, employees, representatives and attorneys, and any one associated with or acting in concert or participation with them or any of them, and each of them be, and each of them hereby is, enjoined and restrained from (i) inserting or causing or requiring or permitting to be inserted in any invitation to bid on any public contract for the manufacture or furnishing of any iron or steel product or any product of the Iron and Steel Industry, or in any advertisement for bids on any such contract or in the specifications for any such contract, or in any bid on any such

contract, or in any required form for any such bid, or in any such contract, any stipulation or representation that any person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, or otherwise, not less than the minimum wages set forth in the Determination, or any stipulation or representation of like purport or effect, and (ii) inserting or causing or requiring or permitting to be inserted in any invitation to bid on any public contract for the manufacture or furnishing of any such product, or in any advertisement for bids on any such contract, or in the specifications for any such contract, or in any bid on any such contract, or in any required form for any such bid, or in any such contract, the following stipulation or representation:

"All persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles or equipment are to be manufactured or furnished under the contract; Provided, however, That this stipulation with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor."

or any stipulation or representation of like purport or effect; provided, however, that the provisions of clause (ii) of this subparagraph (b) shall not apply to any invitation to bid or advertisement issued or published after the effective date of any new determination by the Secretary of Labor of the United States, made subsequent to the date hereof in good faith and pursuant to law, with respect to prevailing minimum wages to be paid by public contractors to persons employed in the manufacture or furnishing to agencies of the United States of iron or steel products or products of the Iron and Steel Industry, or to any bid in response to any such invitation or advertisement, or to any required form for any such bid, or to any contract awarded upon any such bid, or to any specification for any such contract.

Index to Exhibits

Document	Exhibit No. or letter
Complaint, filed February 25, 1939, as amended March 14, 1939	1
Exhibits to Complaint:	
Notice of hearing before Public Contracts Board	A
Report of Public Contracts Board	B
Petition for reopening of hearing before Public Contracts Board	C
Exceptions to Report of Public Contracts Board	D
Determination, dated January 16, 1939	E
Order postponing effective date of Determination	F
Base rates for common labor	G
Order granting leave to amend Complaint, filed March 14, 1939	2
Motion for preliminary injunction, filed February 27, 1939	3
Affidavits in support of preliminary injunction:	
Darwin S. Wolcott, filed February 25, 1939	4
John W. Logan, filed February 25, 1939	5
Francis J. Tucker, filed February 25, 1939	6
Henry S. Evans, filed February 25, 1939	7
Wilbert Wear, filed February 25, 1939	8
J. A. Downey, filed February 25, 1939	9
Marjorie Wilford, filed February 25, 1939	10
Henry S. Evans, filed March 7, 1939	11
John W. Logan, filed March 7, 1939	12
Fred W. Morrison, filed March 8, 1939	13
Darwin S. Wolcott, filed March 9, 1939	14
James A. Downey, filed March 13, 1939	15
John W. Logan, filed March 13, 1939	16
John W. Logan, filed March 13, 1939	17
Affidavits opposing preliminary injunction:	
Edward J. Ennis, served March 6, 1939	18
M. L. Ring, served March 6, 1939	19
Temporary restraining order, filed February 28, 1939	20
Order making of record extensions of temporary restraining order, filed March 14, 1939	21
Order setting cause down for final hearing, filed March 1, 1939	22
Notice of motion for preliminary injunction, filed March 1, 1939	23
Order setting cause down for hearing on motion of defendants to dismiss Complaint, filed March 3, 1939	24
Motion of defendants to dismiss Complaint, filed March 6, 1939, and notice thereof	25
Order denying motion of Steel Workers Organizing Committee for leave to intervene and dismissing petition to intervene, filed March 14, 1939	26
Judgment dismissing Complaint, as amended, at the foot of which are noted certain exceptions of petitioners and their appeal, filed March 14, 1939	28
Petitioners' notice of appeal, filed March 14, 1939	28
Petitioners' assignment of errors, filed March 15, 1939	29

United States Court of Appeals for the District of Columbia

No. 3056

LUKENS STEEL COMPANY, A CORPORATION, ET AL., PLAINTIFFS-APPELLANTS

vs.

FRANCES PERKINS, INDIVIDUALLY AND AS SECRETARY OF LABOR OF THE UNITED STATES, ET AL., DEFENDANTS-APPELLEES

United States Court of Appeals for the District of Columbia. Filed Mar. 18, 1939. Joseph W. Stewart, Clerk.

Appellees' objections to appellants' petition for an injunction pending appeal

PRELIMINARY STATEMENT

The Appellees respectfully object to any injunction or stay whatever pending determination of this appeal. Appellants propose a form of injunction (Schedule A annexed to petition) which enjoins the Appellees from enforcing the Minimum Wage Determination for the Iron and Steel Industry (hereinafter called the "Determination") made by the Acting Secretary of Labor pursuant to the authority of Public Contracts Act, not simply with respect to the Appellants as possible future bidders or possible future Government contracts for iron and steel products which Appellants may manufacture. The Appellants also seek to enjoin operation of the Determination even with respect to all of the possible bidders who are not parties to this action and who, for all that Appellants disclose, favor and desire the Determination tending to eliminate wages as an element in competition for Government contracts. They seek to enjoin operation of the Determination with respect to all possible Government contracts for the products of the iron and steel industry even though the possible future contracts may be for steel or iron products which the Appellants do not manufacture and in which they have no interest.

In *limine*, and before summarizing briefly the objections to the Appellants' contentions in support of an injunction pending appeal, the Appellees respectfully submit to this Court that, without now considering fully the many legal arguments on the merits now advanced by Appellants on this application and which will be considered on the determination of the appeal, no injunction whatever pending appeal should be granted solely for the reason that the Appellants' papers fail wholly to disclose facts of probable great and irreparable damage pending determination of the appeal. The Appellants refer to no specific Government contracts for iron or steel which are to be made before determination of this appeal but merely state generally that unissued invitations to bid, confidential until issued, will be issued "in the near future" (Petition, p. 16) and Appellants intend to bid thereon. There is no basis for an opinion that Appellants probably would obtain such profitable Government contracts pending determination of this appeal that great, imminent, and irreparable damage, a necessary condition for any relief pending appeal, is about to occur. The appeal will not be rendered moot if an injunction pending appeal is not granted. At the most Appellants possibly may lose Government contracts on which they might or might not make a profit.

For these reasons alone, in addition to the reasons set out more fully below, no injunction pending appeal should be granted.

STATEMENT OF PROCEEDINGS

The Public Contracts Act [Public No. 846, 74th Cong., 49 Stat. 2036, copy of which is attached, marked "Exhibit A"] provides that in every contract entered into by an agency of the United States for the manufacture or furnishing of materials, supplies and equipment in any amount in excess of $10,000 there shall be included, *inter alia*, a stipulation by the contractor that all persons employed in the performance of the contract will be paid not less than "the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries currently operating in the locality in which the materials or supplies are to be manufactured or furnished" [Section 1 (b)].

Pursuant to the authority of Section 1 (b) of the Public Contracts Act the Acting Secretary of Labor on January 16, 1939 made a determination of the minimum wages prevailing in various localities in the iron and steel industry. Appellants, all of whom are relatively small steel companies located within one of the six "localities" for which prevailing minimum wages were determined by the Acting Secretary of Labor, had notice of and participated in the hearings before the Public Contracts Board and subsequently had notice of and took exception to the recommendations made by the Public Contracts Board to the Secretary of Labor in respect of the prevailing minimum wages for the industry.

After the issuance of the Determination (which rejected in part the recommendations of the Public Contracts Board) by the Acting Secretary, Appellants requested an extension of the effective date of the Determination and their request in this respect was partially granted, the effective date being extended from January 31 to March 1, 1939. At no time have the Appellants sought to obtain administrative exemption from the order in accordance with the provisions of Section 6 of the Public Contracts Act.

On February 25, 1939, Appellants commenced this action. The complaint alleged in substance that the Acting Secretary of Labor erred in defining the "locality" within which the Appellants' plants are located, arguing that the term "locality" as used in Section 1 (b) of the Public Contracts Act is synonymous with "city, town, village, or other civil subdivision of the state": that, even conceding that the Secretary of Labor must exercise judgment and discretion in applying the term "locality", the Acting Secretary in this case failed to give adequate recognition to various relevant factors; that the effect of the Acting Secretary's construction of the statute was to require Appellants to pay a higher minimum wage than they would have been required to pay for work on government contracts if the statute had been properly construed; that three of the seven Appellants desired to bid on one or more of five designated Navy Department schedules for which invitations to bid had theretofore been issued; and that if the Determination were permitted to become effective, Appellants would not be able successfully to compete with their larger and more integrated competitors; and that they would

thereby be unable to obtain government contracts, to their irreparable injury.

It will be noted that Appellants' contention as to the proper construction of the word "locality" was specifically considered and rejected on grounds adequately stated in the Determination itself [pp. 4–10, inclusive; copy attached, marked "Exhibit B"]. It was there recognized that there is ample room for differences of opinion as to the precise boundaries of a particular "locality" and certain of the recommendations of the Public Contracts Board were rejected because of their failure to give adequate recognition to various relevant factors to be considered in defining the boundaries of particular "localities" within which prevailing minimum wages should be determined.

On the basis of the allegations in the complaint the Appellants requested a broad temporary restraining order to be followed by identical preliminary and permanent injunctions, in effect, setting aside and staying the operation of the Determination as to all bidders on all government contracts, whether or not such bidders were located in the same "locality" with the Appellants and whether or not such bidders objected to compliance with the Determination.

The District Court declined to grant such a broad temporary restraining order and instead, by the order dated February 28, 1939, restrained the Secretary of Labor and the Secretary of the Navy only until March 7, 1939 from giving effect to the Determination on any bids which might be submitted by the three Appellants who had indicated a desire to bid on any or all of four designated schedules on which it was alleged such Appellants desired to bid. The stay was continued orally from day to day on the argument of the Appellees' motion to dismiss the complaint and was dissolved upon determination of that motion on March 14, 1939. As was stated by the Appellants in the oral argument in the District Court on Appellees' motion to dismiss, Appellants did not in fact submit bids on any of the schedules covered by the temporary restraining order. Appellants allege that had they submitted bids, such bids would have been lower than the bid of the successful bidder on certain contracts. Appellants also state that their failure to submit bids under the protection of the temporary restraining order was due to the effect of the restricted order which was to create two classes of bidders—one, a favored class consisting of the three Appellants, the other, consisting of all other bidders who were still bound by the Determination—and that under such circumstances any contract which might be awarded to Appellants would be illegal.

It will be seen that the effect of the temporary restraining order granted by the District Court was equivalent to an administrative exemption which might be granted to Appellants under Section 6 of the Act. Appellants' position seems to be, however, that while an administrative exemption (for which they have not even made application) would create no illegal discriminations, the judicial ex-

emption granted by the District Court was less valid. After extensive oral argument, the District Court (Bailey, J.) sustained Appellees' motion to dismiss, stating orally from the bench that it did so, first, because it was extremely doubtful whether Appellants had any standing to sue at all, second, because it did not appear that the Determination, even assuming it to be erroneous, was so arbitrary or capricious as to warrant judicial interference with the executive branch of the government. Under these circumstances, the District Court declined to grant Appellants' request for a stay of the Acting Secretary's order pending the appeal, stating that it would not further interfere with the government and that Appellants would have to obtain such a stay, if at all, from this court.

ARGUMENT

Appellants have shown no good cause for an injunction pending appeal

I. Probable Success on Appeal

It is elementary that to justify granting a stay after final decree it must appear that there is a serious doubt as to the correctness of the District Court's decision, or stated differently, that Appellants will probably succeed on their appeal. Virginian Railway v. U. S. 272 U. S. 658, 672 (1926); Cotting v. K. C. Stockyards Co., 82 Fed. 850, 857. Clearly the requisite probability of success is absent in the present case.

A. The Court Is Without Power To Grant The Stay.

1. The relief requested—granting of a stay—calls for the exercise of an administrative power and not a judicial power. From the face of the pleadings, including the Determination which is made a part of the pleadings, it is apparent that the Determination which Appellants seek to have stayed is not an order. The Determination does not direct the Appellants to do anything or to refrain from doing anything. It is, in fact, a quasi-legislative finding and the damage apprehended by Appellants will result, if at all, not from the operation of the Determination but from the operation of the Public Contracts Act itself. The relation between the Determination and the Public Contracts Act is in no essential way dissimilar from the relation between the Interstate Commerce Commission's findings that a railroad was not a "street, interurban, or suburban electric railway" and the Railway Labor Act of 1934; or the relation between the Federal Power Commission's finding that "the interests of Interstate or foreign commerce would be affected" by the construction of a dam and section 23 (b) of the Federal Power Act, as amended. The situation is thus within the controlling principle of Shannahan v. United States, 303 U. S. 596, decided April 4, 1938; Carolina Aluminum Co. v. Federal Power Commission, 97 F. (2)

435 (C. C. A., 4, 1938): Newport Electric Corporation v. Federal Power Commission, 97 F. (2) 580 (C. C. A., 2, 1938).

Appellant is requesting this Court to grant a stay which will have the effect of permitting appellant to bid for Government business on minimum terms different from those which have been prescribed by the administrative agency provided for by the Public Contracts Act. Thus it is clear that the real reason why the Court lacks the power to grant a stay order in this case is that the relief requested calls for the exercise of an administrative power and not a judicial power.

Clearly, this Court would not grant the relief requested by this stay as a final disposition of this case. To do so would be a useless thing. The Court could hardly set aside the Determination and remand the case, as was done by the District Court in United States & Interstate Commerce Commission v. Griffin, 303 U. S. 226, 58 S. Ct. 601, to take "such further action in the premises as the law requires in view of the annullment and setting aside of" the findings. Such a situation would leave the controversy oscillating between the Secretary of Labor and the Court indefinitely or until such time as the Court might surrender its judgment for that of the Secretary of Labor, or the Secretary of Labor might surrender his judgment for that of the Court. It is clear, therefore, that unless the Court is prepared to go further and itself make what it deems to be a proper finding, it should not set aside the finding made by the administrative agency provided for by the Public Contracts Act. If the Court has no jurisdiction to set aside the Determination as a final disposition of this case, it clearly has no jurisdiction to grant the requested stay.

2. The Public Contracts Act Does Not Authorize Judicial Review of The Determination.

Nothing in the Public Contracts Act itself confers jurisdiction upon the Court to review minimum wage determinations of the Secretary of Labor. Section 5 of the Act may be said to contemplate judicial review of certain types of "findings" of the Secretary of Labor. But the "findings" which section 5 of the Act says shall be conclusive in any Court if supported by a preponderance of the evidence are findings in respect of breaches or violations of the representations and stipulations provided for by section 1. Such findings, of course, would be made in respect of particular persons and would provide the basis of affirmative action (for example, by way of blacklisting) by the Secretary of Labor. But section 5 does not relate to "determinations" of prevailing minimum wages under section 1. And, indeed, to so construe section 5 would render the general provisions of section 4 (granting the Secretary of Labor power to make investigations and findings) mere surplusage, a construction to be avoided.

Thus, nothing in the Public Contracts Act itself alters the fundamental and well recognized principle that the Courts have no

jurisdiction to review and set aside findings or determinations, as distinguished from *orders* which direct persons to act or to refrain from acting.

B. Appellants Have No Standing To Sue.

Even assuming that the Determination is subject to judicial review, Appellees contend that under elementary principles of law judicial review of the Determination may be obtained only if the Determination interferes with some legally protected right of the Appellants and that the Appellants in the present proceeding being merely prospective bidders on government contracts, have no legally protected right which might be interfered with by the Determination. Alabama Power Co. v. Ickes, 302 U. S. 464; Heim v. McCall, 239 U. S. 175; B. F. Cummins Co. v. Burleson, 40 App. D. C. 500.

C. The Complaint Fails To State A Cause of Action In Equity.

Appellees further contend that, even assuming the existence of a legally protected right which might be interfered with by the Determination, Appellants have no standing to invoke the equitable jurisdiction of the Court.

1. There is no showing of great, immediate, certain, and irreparable damage to the Appellants as a result of the enforcement of the Determination. Indeed, there is not and can not be a showing of any damage whatsoever; Appellants allege that if they were to bid on Government contracts, and if they were to become low bidders, they would make a profit on the business. There is no allegations as to how much profit they would make.

2. Appellants do not even allege that they have diligently pursued and exhausted their administrative remedies.

3. The functions of the Secretary of Labor under the Public Contracts Act involve the exercise of judgment and discretion and, even though wrong, the Determination in this case is not so arbitrary or capricious as to warrant judicial interference with the executive branch of the Government in the administration of a Congressional statute.

Appellees' Points and Authorities and Supplemental Points and Authorities in support of their motion to dismiss the complaint briefly discussing the application of such Points and Authorities to the instant case, are attached hereto marked Exhibit "C." Apellees respectfully submit that their memorandum clearly demonstrates the improbability of the Appellants' success on this appeal. Appellants have cited no authorities *contra* and have not attempted to distinguish the authorities relied upon by Appellees.

II. There Is No Showing That Appellants Will Suffer Great, Immediate, Certain, Irreparable Injury If The Stay Is Not Granted

While a stay is not a matter of right, even if irreparable injury might otherwise result to Appellants (Virginian Railway Co. v. U. S., supra; In Re Haberman Mfg. Co. 147 U. S. 525), it is elementary

that such a showing is a necessary prerequisite to the granting of a stay. That Appellants will not suffer such irreparable injury as to warrant the granting of the stay is indicated by the fact that Appellants have in fact not even submitted bids on the contracts specifically covered by the temporary restraining order granted by the District Court relieving three of the Appellants from compliance with the Determination in question. This failure to bid, when they had opportunity to do so under the protection of the temporary restraining order, indicates that the Appellants' loss of government business is not a matter of vital concern. In their petition, Appellants cite numerous contracts which have already been awarded but so far as contracts which may be awarded between the present date and the date of the disposition of the appeal, they state only that invitations to bid will be issued "in the near future." [Petition, p. 16.] Such allegations are too remote and conjectural to sustain the conclusion that the Appellants will suffer great, immediate, certain, and irreparable injury if the stay is not granted.

III. A Stay, if Granted Would Not Maintain the Status Quo But Would in Effect Grant the Appellants Relief on the Merits

A stay of the Determination for even a limited period of 60 days would in no way preserve the status quo. On the contrary, it would mean that the public and the workers in the iron and steel industry who would otherwise benefit by the minimum wage requirements of the Determination would be irrevocably denied its benefits on any contracts which might be awarded during the period of the stay. Only if the government's national defense program, itself, and the purchasing program implementing it are suspended pending the hearing and determination of this appeal, can the status quo of this Determination be preserved.

IV. Stay Pending Appeal Should Be Denied Where the District Court Has Dismissed the Bill for Want of Jurisdiction.

In the present case, Appellees' motion to dismiss the complaint was sustained by the District Court on the ground of lack of jurisdiction. The Court expressed the view that it strongly doubted Appellants' standing to sue at all and that in any case the Determination in question is not so arbitrary or capricious as to warrant a court of equity in taking jurisdiction. Under these circumstances the District Court declined to grant the stay, and this Court likewise should not grant the requested stay of the order pending the appeal from the dismissal on jurisdictional grounds. Corona Coal Co. v. Southern Ry. Co., 266 Fed. 726, 735 (N. D. Ala. 1920).

V. The Granting of a Stay Would Cause Great and Irreparable Injury to the Public at Large and to Iron and Steel Workers Who Would Otherwise Receive the Benefits of the Determination.

A. Stay of the minimum wage Determination will in effect permit government contractors to pay any minimum wages they may please. Yet Congress, by the Public Contracts Act, has provided that government contractors should be required to pay at least the minimum wages determined by the Secretary of Labor to be prevailing minimum wages in the locality in which the supplies are to be manufactured. The effect of granting the stay would thus be to suspend the operation of the Congressional statute. Such a suspension is itself a grave and irreparable injury to the public. Dreyfoos v. Edwards, 284 Fed. 596 (S. D. N. Y. 1919) per Learned Hand, J; Cunard v. Mellon, 284 Fed. 890, 898, (S. D. N. Y. 1922), per Learned Hand, J.

B. Furthermore, the granting of the stay would result in irreparable loss to the several thousand workers in the iron and steel industry now receiving less than the prevailing minimum wage as determined by the Acting Secretary of Labor and who would, but for this stay, receive the higher minimum wage found by the Determination. No bond conditioned in favor of the Appellees can adequately protect the workers thus subjected to loss. L. & N. Ry. Co. v. R. R. Commission, 208 Fed. 35, 60 (M. D. Ala. 1913).

VI. Great Weight Should be Given to Refusal of the District Court to Grant a Stay

The District Court had opportunity to and did examine and hear arguments on the jurisdictional questions and on the merits and, after hearing oral argument during four days, not only sustained Appellees' motion to dismiss the complaint, but denied Appellants' request for a stay of the Determination pending the determination of the appeal. That court was in a position to estimate the probability of Appellants' success on the appeal and also to determine whether or not the balance of convenience requires stay of the Determination. This it declined to do and its action should be given great weight by this Court. An extraordinary showing should be required before this Court grants a stay. Cumberland Telephone Co. v. Commission, 260 U. S. 212, 219 (1922); Magnum Co. v. Coty, 262 U. S. 159, 164 (1922).

SCOPE OF ANY INJUNCTION PENDING APPEAL

I. If the Court should, in the exercise of its discretion, determine to grant Appellants' request for a stay, the stay should be limited, as was the temporary restraining order granted by the District Court, to staying the operation of the Determination only as to such of these Appellants as indicate at least a bona fide intention to bid on government contracts and should further be restricted to specific contracts upon which Appellants propose to bid.

II. If a stay is granted a bond should be required conditioned in favor of the Secretary of Labor, as provided in Section 2 of the Public Contracts Act, for the amount of the difference between the minimum wages actually received by workers on any government contracts which the Appellants may obtain and the amount which such workers would have received pursuant to the minimum wage Determination of the Acting Secretary of Labor.

Clearly a bond conditioned as provided in Rule 65 (c) of the Federal Rules of Civil Procedure would not protect the workers who would be denied the benefits of the Acting Secretary's minimum wage determination. Appellees, as such, would suffer no especial injury as the result of the granting of the stay. The persons who will suffer injury are the workers who will be denied the benefits of the minimum wage determination and Appellants' competitors.

CONCLUSION

Appellees respectfully submit that Appellants' application for a stay of the determination in the matter of the prevailing minimum wages in the iron and steel industry should be denied.

EDWARD J. ENNIS,
Attorney for Appellees.

EDWARD J. ENNIS,
Attorney, Department of Justice.
CHARLES EDWARD RHETTS,
Associate Solicitor, Department of Labor,
Of Counsel.

Receipt of copy of foregoing Objections acknowledged March 18, 1939.

_____,
Attorneys for Appellants.

Exhibit C

In the District Court of the United States for the District of Columbia

Civil Action File No. 1839

LUKENS STEEL COMPANY, A CORPORATION, ET AL., PLAINTIFFS

v.

FRANCES PERKINS, INDIVIDUALLY AND AS SECRETARY OF LABOR OF THE UNITED STATES, ET AL., DEFENDANTS

Points and authorities on motion to dismiss

I. This Court lacks jurisdiction of the subject matter of this action and the complaint fails to state a claim upon which any relief can

be granted, and this action and the complaint should be dismissed because the complaint discloses no legally protected right of any of the plaintiffs entitling any of them to maintain this action.

A. This action and the complaint should be dismissed unless the complaint discloses legally protected rights of the plaintiffs with which the defendents are interfering or threatening to interfere.

Frothingham v. Mellon, 262 U. S. 447, 486–489, affirming 288 Fed. 252 (App. D. C.).

Alabama Power Company v. Ickes, 302 U. S. 464, affirming 94 F. (2d) 303 (App. D. C.), reversing LXIV Wash. L. R. 563.

Duke Power Co. v. Greenwood Co., 302 U. S. 485.

Tennessee Elec. Power Co. v. Tennessee Valley Authority, 305 U. S. —, 59 S. Ct. 366, No. 27, January 30, 1939.

Railroad Co. v. Ellerman, 105 U. S. 166.

Wallace v. Ganley, 95 F. (2d) 364 (App. D. C.).

B. The plaintiffs, as prospective government contractors, have no legally protected rights with which defendents are threatening to interfere.

1. The United States, like one of the States, has complete power to provide conditions and regulations for government contracts.

Ellis v. United States, 206 U. S. 246.

Atkin v. Kansas, 191 U. S. 207.

Heim v. McCall, 239 U. S. 175.

2. The statutory regulation of government contracts is intended solely for the protection of the United States and not for prospective contractors.

American Smelting & Refining Co. v. United States, 259 U. S. 75, 78.

United States v. New York Porto Rico S. S. Co., 229 U. S. 88, 93.

3. Prospective government contractors have no standing to question conditions imposed by the Government. They lack not merely the right to bring a particular form of action but also any legally protected right entitled to any relief whatever.

W. Ames & Co. v. Wallace, et al. (reported in 1 S. C. D. C. (N. S.) 238, Supreme Court of the District of Columbia. February 1, 1935, Eq. No. 57,796). (Affirmed, 81 F. (2d) 414 (App. D. C.).)

The Northwest Motor Co. v. Wallace, et al. (No opinion, decree dismissing complaint by the Supreme Court of the District of Columbia, May 25, 1934, Eq. No. 57,189, LXII Wash. Law Rep. 425).

O'Brien v. Carney, 6 F. Supp. 761 (D. C. Mass., 1936).

Colorado Paving Co. v. Murphy, 78 Fed. 28 (C. C. A. 8th); appeal dismissed for want of jurisdiction, 166 U. S. 719.

United States Wood Preserving Co. v. Sundmaker, 186 Fed. 678 (C. C. A. 6th).

B. F. Cummins Company v. Burleson, 40 App. D. C. 500. See also Molloy v. New Rochelle, 198 N. Y. 402, 92 N. E. 94. Talbet Paving Co. v. Detroit, 109 Mich. 657; 67 N. W. 979.

II. This action and the complaint, seeking an injunction, should be dismissed because the complaint fails to state any facts entitling the plaintiffs to any relief in equity or to any injunctive relief.

A. The complaint of mere prospective bidders fails wholly to allege the particular facts disclosing imminently threatening, great, immediate, certain and irreparable pecuniary damage to property necessary to state a cause of action for an injunction.

Hegeman Farms Corp. v. Baldwin, 293 U. S. 163, 170, affirming 6 F. Supp. 297 (S. D. N. Y.).

California v. Latimer, et al., No. 13, Original, October Term, 1938, decided December 5, 1938.

W. Ames & Co. v. Wallace, et al., supra.

B. Insufficient facts are alleged to disclose a threat of immediate enforcement of the determination of the Secretary of Labor against the plaintiffs by the defendants.

California v. Latimer, et al., supra. Ex parte La Prade, 289 U. S. 444, 458.

Champlin Rfg. Co. v. Commission, 286 U. S. 210, 238.

C. The complaint fails to allege that the plaintiffs have exhausted their administrative remedies.

Myers v. Bethlehem Corp., 303 U. S. 41, 51.

Hegeman Farms Corp. v. Baldwin, 293 U. S. 163, 172.

P. F. Petersen Baking Co. v. Bryan, 290 U. S. 570, 575.

Red River Broadcasting Co. v. Federal C. Commission, 98 F. (2d) 282 (App. D. C.).

III. The complaint, insofar as it seeks a declaratory judgment, should be dismissed.

A. The complaint does not state a justiciable case or controversy within the meaning of the Declaratory Judgment Act.

Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, Electric Bond Co. v. Comm'r, 303 U. S. 419, 443.

B. As a matter of judicial discretion a declaratory judgment should be denied.

Aetna Casualty & Surety Co. v. Charles, 92 F. (2d) 321 (C. C. A. 4th).

IV. The complaint should be dismissed because this is a suit against the United States which has not consented to be sued.

Wells v. Roper, 44 App. D. C. 276; 246 U. S. 335.

Naganab v. Hitchcock, 25 App. D. C. 200, 202 U. S. 473.

United States ex rel. Goldberg v. Daniels, 231 U. S. 218.

Louisiana v. McAdoo, 234 U. S. 627.

Belknap v. Schild, 161 U. S. 10.

Oregon v. Hitchcock, 202 U. S. 60.

Turner v. United States, 248 U. S. 354.

Morrison v. York, 266 U. S. 481.

Coumes & Rappis v. Perkins et al., memorandum decision dated December 31, 1937 (D. C. Dist. Columbia), Bailey J.

In the United States Court of Appeals for the District of Columbia

Original No. 3056

LUKENS STEEL COMPANY ET AL., PETITIONERS-APPELLANTS

vs.

FRANCES PERKINS, INDIVIDUALLY AND AS SECRETARY OF LABOR OF THE UNITED STATES, ET AL., RESPONDENTS-APPELLEES

United States Court of Appeals for the District of Columbia. Filed Mar. 22, 1939. Joseph W. Stewart, Clerk.

COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss.

John W. Logan being duly sworn upon his oath deposes and says:

I am the Secretary and Treasurer of Alan Wood Steel Company (hereinafter called the "Company"), one of the petitioner-appellants in the above entitled action. The company is engaged in the production and sale of certain products of the iron and steel industry.

Invitations to bid were issued on a proposed contract 33119-A Schedule 1, by the Reclamation Bureau at Denver, Colorado, of the Department of the Interior, for approximately 475 tons of steel plates. The bids on said invitations were opened on February 6, 1939. The Company bid on such steel plates.

On or about March 6, 1939 the Company received the following telegram from the aforesaid Reclamation Bureau:

"Re your bid under invitation 33119-A Schedule One, advise immediately if you will accept Department of Labor wage determination for iron and steel industry dated January 16, 1939 and effective March 1, 1939, as a part of contract if awarded to you.

RECLAMATION BUREAU."

In reply thereto the Company sent the following telegram to said Reclamation Bureau on March 7, 1939:

"RECLAMATION BUREAU,
Denver, Colo.

Retel sixth our quotation bid February sixth predicated labor rates in effect at the time. Regret are not willing accept Department of Labor wage Determination as we are participating in action now pending in court seeking permanent injunction against this determination.

ALAN WOOD STEEL CO."

On or about March 10, 1939, said invitations to bid were reissued on said proposed contract 33119-A Schedule One by the said Reclamation Bureau of the Department of the Interior for the aforesaid quantity of steel plates and said invitation required that each bidder thereon agree to comply with the Department of Labor wage

Determination for the iron and steel industry which became effective March 1, 1939, if said contract be awarded to it.

The bids on said reissued invitations were opened March 20, 1939.

The Company desired to bid on said reissued invitation and would have done so had it not been for the fact that said bid and any contract awarded to it would have been subject to the aforesaid wage Determination. The Company did not bid thereon solely because of said Determination.

JOHN W. LOGAN.
John W. Logan.

Sworn to and subscribed before me this 21 day of March 1939.
[SEAL] ETHEL F. ALLEN,
Notary Public.

My commission expires August 2, 1942.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

George W. Witney, being duly sworn, deposes and states that he is an attorney with offices at 2004 Finance Building, 1428 South Penn Square, Philadelphia, Pennsylvania, and that he is a member of the bar of Philadelphia County, Pennsylvania.

He further deposes and states that he is general counsel for South Chester Tube Company, a Pennsylvania corporation having its principal office at Chester, Pennsylvania. He further deposes and states that attached hereto is a true and accurate copy of an agreement entered into under date of April 6, 1938, by and between the South Chester Tube Company and the United Tube Workers Lodge No. 184 of the Amalgamated Association of Iron, Steel and Tin Workers of North America, which organization acts as a collective bargaining agency for the employees of the Company.

He further deposes and states that the said agreement was drawn and executed under his supervision on behalf of the Company and that the said agreement superseded an agreement dated May 12, 1937, which was entered into by said Company and the Steel Workers Organization Committee on behalf of members of the same lodge.

He further deposes and states that Mr. Thomas G. Gillis who signed the agreement as District President of the Amalgamated Association of Iron, Steel and Tin Workers of North America represented himself to be a representative of the American Federation of Labor.

In witness whereof he has hereunto attached his signature this 21st day of March, 1939.

GEORGE W. WITNEY.

Sworn and subscribed to before me, a Notary Public in and for the State of Pennsylvania this 21 day of March, 1939.

REGINA L. HOEY,
Notary Public.

My commission expires Feb. 14, 1941.

Agreement Between the South Chester Tube Co. and United Tube Workers Lodge, No. 184, Pa., Amalgamated Association of Iron, Steel and Tin Workers of North America

Entered into the 6th day of April 1938

SOUTH CHESTER CO.—UNITED TUBE WORKERS LODGE NO. 184, PA.

Agreement

This agreement, dated April 6th, 1938, is entered into between the South Chester Tube Company (hereinafter known as the Company) and United Tube Workers' Lodge No. 184, of the Amalgamated Association of Iron, Steel and Tin Workers of North America (hereinafter known as the Union).

It is the intent and purpose of the parties hereto that this agreement will promote and improve industrial and economic relationships between those employees of the Company who are members of the Union, and that it will set forth the basic agreement covering rates of pay, hours of work, and conditions of employment to be observed between the parties hereto during its existence.

The term "employers," as used in this agreement shall not include Foremen, Assistant Foremen, or Supervisors in charge of any classes of labor, or Watchmen or any salaried employees.

I. Recognition.—The Company recognizes Local No. 184 of the Amalgamated Association of Iron, Steel and Tin Workers of N. A. as the collective bargaining agency for those employees of the Company who are members of the Union. The Company recognizes and will not interfere with the right of its employees to become members of the union. There shall be no discrimination, interference, restraint or coercion by the Company, or any of its agents against any employee because of membership in the Union. Employees shall have the right to transact Union business on Company property but not during working hours nor on days when they are not regularly employed.

II. Wages.—The present basic wage scale established by the Company March 16, 1937, shall remain in force so long as this agreement shall remain in effect, provided, however, should there be any general increase or decrease in the basic wage scales in the Steel Industry in the district in which the Company is located the Company will change its basic wage scale to conform therewith.

III. Hours.—Eight (8) hours shall constitute a day's work and forty (40) hours shall constitute a week's work, made up of five (5) eight (8) hour shifts, worked on consecutive days. (a) Time and one-half time shall be paid for all over eight (8) hours in any one (1) day or for all over forty (40) hours in any one week. (b) Any employee called back to work after completing his regular eight (8) hour shift within any twenty-four (24) hour period shall be guaranteed a minimum of four (4) hours at the rate of time and one-half.

IV. Grievances.—Should differences arise between the Company and the Union or its members employed by the Company as to the meaning and application of the provisions of this agreement, or should any local trouble of any kind arise in the plant, there shall be no suspension of work or interference with the regular routine business on account of such differences, but an earnest effort shall be made to settle such differences immediately in the following manner:

First, between the aggrieved employee and the foreman of the department involved.

Second, between a member or members of the shop committee, designated by the Union and the Superintendent of the plant.

Third, between the representatives of the National Union and the Shop Committee and the executives of the Company; and

Specified periods shall be agreed upon between the shop committee and the plant superintendent for the presentation of grievances hereunder. Provided, however, that matters pertaining to discharges or other matters that cannot reasonably be delayed until the time of the next regular meeting may be presented at any time in accordance with the foregoing provisions.

The Shop Committee shall consist of not more than one employee from each department selected by the Union who will be afforded such time off without pay as may be required:

1. To attend regularly scheduled committee meetings.

2. To attend meetings pertaining to discharges or other matters which cannot reasonably be delayed until the time of the next regular meeting.

3. To visit departments other than his own at all reasonable times for the purpose of transacting the legitimate business of the Union.

V. Seniority.—It is hereby agreed that seniority rights shall prevail. During layoffs employees with the longest service shall be laid off last on the basis of seniority and skill in the order stated. Those already employed shall be advanced to better paying operations on the basis of seniority and skill.

VI. Safety and Health.—It is hereby agreed that the Company recognizes the importance of increasing safety provisions in the plant for the protection of the health, life and limb of employees and that the Management will make every effort to improve such conditions when called to its attention. Heating, lighting, toilet and locker facilities shall be subject to review under Clause IV of this agreement.

VII. Vacations.—One week's vacation with pay at their prevailing hourly rate shall be granted all employees with two years' service or more on June 1, 1938. Vacations shall be assigned by the Management to take place between the period of May 1st and November 1st unless the plant is shut down for a vacation period.

VIII. Holidays.—The following shall be observed as holidays: Easter Monday, Decoration Day, July 4th, Labor Day, Thanksgiving Day, Christmas. Time and one-half shall be paid for work on holi

days to all employees other than "stand-by" men, Boiler Firemen and Pipe Fitter "stand-by" men shall receive time and one-half for July 4th, Labor Day and Christmas.

This agreement shall be in force until June 30, 1939, unless it be mutually agreed in writing at least thirty (30) days before expiration, that it be extended, in which event it shall be extended for such period or periods as may be mutually agreed upon.

South Chester Tube Co., George W. Sweet, General Superintendent. Amalgamated Association of Iron, Steel and Tin Workers of N. A., by Thomas G. Gillis, District President. United Tube Workers' Lodge, No. 184, by John J. Malick, President, Jacob Melnick, Secretary. Committee: Nicholas Tuozzo, H. K. Meyers, John M. Rogal, A. E. Strickler, Richard Arscott, Jr., Bernie Buck, J. M., Frank Blisard, Jr.

The Amalgamated Press.

Officers for 1938—President, John J. Malick; Vice President, Bernard Buck; Recording Secretary, Jacob Melnick; Treasurer, Gilbert Brown; Financial Secretary, Wm. Cavanaugh; Guide, George Popko; Inside Guard, Peter Penkowski; Outside Guard, Michael Stahurski; Journal Agent, Irwin Reist; Cor.-Rep., Nicholas Tuozzo.

Trustees—John O. Smith, Harry Killian, Wm. Grasty.

Mill Committee for 1938—Mechanical Department—Michael Tuozzo.

Welding Department—H. K. Meyers, Frank Blisard, Jr., A. E. Strickler.

Cutting Department—John Rogal, Michael Kriko, Wm. Grasty.

Inspection Department—Richard Arscott, Jr., John Shea.

Meetings—Held on the second and fourth Saturdays of each month with exceptions during the following months: June, July and August, when meetings are held every fourth Saturday. Meetings start at 2 P. M. sharp.

Wednesday, March 22nd, A. D. 1939

* * * * *

No. 3056 Original

LUKENS STEEL COMPANY, A CORPORATION, ALAN WOOD STEEL COMPANY, A CORPORATION, SOUTH CHESTER TUBE COMPANY, A CORPORATION, ET AL., PETITIONERS

vs.

FRANCES PERKINS, INDIVIDUALLY AND AS SECRETARY OF LABOR OF THE UNITED STATES, CHARLES V. McLAUGHLIN, INDIVIDUALLY AND AS ASSISTANT SECRETARY OF LABOR OF THE UNITED STATES, L. METCALF WALLING, INDIVIDUALLY AND AS ADMINISTRATOR OF THE DIVISION OF PUBLIC CONTRACTS OF THE DEPARTMENT OF LABOR OF THE UNITED STATES, ET AL.

The argument on petition for temporary injunction in the above entitled cause was commenced by Mr. Frederick H. Knight, attorney

for petitioners, continued by Messrs. O. Max Gardner, attorney for petitioners, and Edward J. Ennis, attorney for respondents, and concluded by Mr. Frederick H. Knight, attorney for petitioners.

On motion of Mr. Lee Pressman for leave of Steel Workers Organizing Committee to intervene, counsel allowed to file brief. Mr. Lee Pressman and Mr. Joseph Kovner were introduced to the Court by Mr. Sydney B. Smith.

* * * * * *

United States Court of Appeals for the District of Columbia

No. 3056 Original. January Term, 1939

LUKENS STEEL COMPANY, A CORPORATION, ALAN WOOD STEEL COMPANY, A CORPORATION, SOUTH CHESTER TUBE COMPANY, A CORPORATION, ET AL., APPELLANTS

vs.

FRANCES PERKINS, INDIVIDUALLY AND AS SECRETARY OF LABOR OF THE UNITED STATES, CHARLES V. MCLAUGHLIN, INDIVIDUALLY AND AS ASSISTANT SECRETARY OF LABOR OF THE UNITED STATES, L. METCALF WALLING, INDIVIDUALLY AND AS ADMINISTRATOR OF THE DIVISION OF PUBLIC CONTRACTS OF THE DEPARTMENT OF LABOR OF THE UNITED STATES, ET AL.

United States Court of Appeals for the District of Columbia. Filed Mar. 27, 1939. Joseph W. Stewart, Clerk.

ORDER

On the petition for a temporary injunction pendente lite.

In view of the importance of the question for decision on appeal in this cause, it is ordered by the Court that the cause be advanced on the docket of this Court and set down for argument at 10 o'clock, A. M., April 3, 1939.

The Court having considered the petition for an injunction pendente lite, and being of opinion that sufficient cause therefor has been shown,

It is ordered by the Court that an injunction pendente lite be, and is hereby, granted against the appellees, and each of them, enjoining them, and each of them, until the further order of the Court, from continuing in effect the Determination made under date of January 16, 1939, by appellee McLaughlin, as Acting Secretary of Labor, pursuant to "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes," approved June 30, 1936, in the matter entitled "In the Matter of the Determination of the Prevailing Minimum Wages in the Iron and Steel Industry."

Dated March 27, 1939.

PER CURIAM.

Judge Edgerton is of opinion that an injunction pendente lite should not issue.

United States Court of Appeals for the District of Columbia

No. 3056 Original

LUKENS STEEL COMPANY, A CORPORATION, ALAN WOOD STEEL COMPANY, A CORPORATION, SOUTH CHESTER TUBE COMPANY, A CORPORATION, ET AL., APPELLANTS

v.

FRANCES PERKINS, INDIVIDUALLY AND AS SECRETARY OF LABOR OF THE UNITED STATES, CHARLES V. MCLAUGHLIN, INDIVIDUALLY AND AS ASSISTANT SECRETARY OF LABOR OF THE UNITED STATES, L. METCALF WALLING, INDIVIDUALLY AND AS ADMINISTRATOR OF THE DIVISION OF PUBLIC CONTRACTS OF THE DEPARTMENT OF LABOR OF THE UNITED STATES, ET AL.

United States Court of Appeals for the District of Columbia. Filed Mar. 29, 1939. Joseph W. Stewart, Clerk.

Motion for reargument or a more specific injunction and security

The appellees respectfully move this Court (I) for oral reargument forthwith of the appellants' motion for a temporary injunction pending appeal granted by the order of this Court filed March 27, 1939, and, in the alternative, for (II) oral argument in support of this motion for an order clarifying and stating the extent of the injunction which has been granted, and (III) determining the security for the injunction for the following reasons:

I. ORAL REARGUMENT

Oral reargument is sought on the grounds (1) that the appellants have not disclosed the great, immediate, and irreparable property damage essential for an injunction pending appeal after dismissal of the complaint and denial of an injunction pending appeal by the District Court; (2) that the damage to the public and to common laborers in the iron and steel industry by an injunction pending appeal enjoining enforcement of the Determination of the Acting Secretary of Labor, dated January 16, 1939, hereinafter called the Determination, will be great and irreparable and, balancing the conveniences, the injunction should be denied; and (3) that the improbability of the appellants' success on appeal requires that the injunction be denied.

1. The appellants have merely shown that one or more of them possibly may be prevented from obtaining government contracts pending appeal, unless they stipulate to pay the minimum wage fixed by the Determination. They have not shown that the possible loss of such possible contracts will result in the great, immediate, and irreparable property damage necessary for an injunction pending appeal, particularly after dismissal of the complaint and denial of a stay pending appeal by the District Court. They have not alleged that the conduct

of their business pending appeal depends upon obtaining government business. Their contention that contracts made pending appeal will or may be unlawful if the Determination eventually is determined to be invalid, is untenable.

2. The injunction pending appeal suspends the operation of an Act of Congress, the Public Contracts Act, in so far as that statute has been put into actual operation by the Determination. It is respectfully submitted that such an injunction logically must be based upon the assumption by this Court, or the decision of this Court before argument of the appeal, that the Determination is an abuse of the Secretary's discretion under the Public Contracts Act. It is most earnestly submitted that even if the appellees' written Objections to the petition for a temporary injunction pending appeal filed in this Court did not disclose, as we submit they do, that the Determination was clearly within the Acting Secretary's discretion, the assumption pending appeal should be that the Acting Secretary acted within the discretion granted by the Public Contracts Act and the question should be neither assumed nor decided against the Government before determination of the appeal. Pending decision on appeal whether (1) appellants even have a standing to sue and (2) whether, in any case, the courts have jurisdiction to review the Determination in this action, the balance of convenience requires that the public and the common laborers in the iron and steel industry should not be deprived of the operations of the statute and the Determination in order to protect the appellants' mere possibility of becoming low bidders and obtaining possibly profitable government contracts pending appeal. The presumption of legality of the acts of a superior official of the coordinate executive branch of the Government should protect the Determination, not alleged to be in bad faith, from an injunction pending appeal in this case.

3. For the reasons set forth in the appellees' Objections to the petition for an injunction it is submitted that it is improbable that the appellants will succeed on the appeal.

II. Clarification of Injunction

If oral reargument of the appellants' motion for an injunction be not granted it is submitted that the oral argument is necessary to clarify the injunction of this Court, filed March 27, 1939, and to obtain an order stating in specific terms the act or acts enjoined. The appellees in their Objections to the injunction and upon oral argument urged that if any injunction be granted it should be restricted to enjoining enforcement of the Determination against parties to this proceeding who may bid on Government contracts pending appeal and should not be extended to other bidders, not parties to this action, and who, for all that appears, may desire to abide by the Determination.

In view of the discussion of this question, it is not clear to the appellees, or to their attorneys who must advise them concerning the meaning and extent of the injunction, which is in general terms

not specifically determining this question, whether appellees are enjoined from continuing the Determination in effect even with respect to bidders not parties to this action. Moreover, in view of the most extraordinary character of any temporary injunctive relief to persons not parties to an action, whose equities do not appear, the appellees are slow to construe the general language of the injunction as meaning to reach this result.

Rule 65 (d) of the Federal Rules of Civil Procedure requires that every injunction "shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail and not by reference to the complaint or other document, the act or acts sought to be restrained; * * *"

It is respectfully submitted that the injunction of this Court filed March 27, 1939, does not comply with Rule 65 (d), is general and is not "specific in terms," and does not "describe in reasonable detail" the acts to be enjoined in the following respects, among others:

1. The injunction does not disclose whether appellees are enjoined not only from future acts enforcing the Determination but are also required to recall and rescind former acts enforcing the Determination with respect to all advertised invitations for bids on government contracts already issued and now pending and requiring a stipulation to abide by the Determination. If the injunction affects such invitations to bid it may be necessary, with expense and delay, to readvertise such invitations to bid in order that all bidders may be on an equal basis. Some bidders may have already submitted bids agreeing to the prior enforcement of the Determination. Does the injunction merely require that any future bidder on the same contract need not agree to the Determination or does it require that prior enforcement of the Determination be rescinded by rejecting all pending bids and readvertising the invitations to bid?

These difficulties in interpreting the injunction are not legalistic and theoretical but practical and pressing. Representatives of the appellees, Secretary of War and Secretary of Navy, have already requested instructions whether the injunction requires readvertising of all pending invitations to bid. Captain Neal D. Franklin, Judge Advocate General's Department of the Army, has explained to the undersigned that officials of the War Department throughout the United States are empowered to advertise locally invitations to bid pursuant to general instructions including Procurement Circular No. 6, annexed hereto as Exhibit A, requiring a stipulation to abide by the Determination. Advice is requested whether a circular rescinding Circular No. 6 should require readvertisement of all invitations which may be outstanding requiring compliance with Circular No. 6.

Moreover, the injunction does not disclose whether compliance with the Determination is not required even under contracts now being performed which agree to the Determination.

2. The injunction contains no statement "specific in terms" to indicate that the appellees are enjoined from enforcing the Determination even with respect to persons, other than appellants, who are not par-

ties to this action and may wish to abide by the Determination. In view of the fact that this question was raised specifically it is submitted that the injunction should settle the question in specific terms and not require the appellees to interpret it at their peril. Any injunction should be restricted to parties to this action.

3. The injunction enjoins all appellees even though as to some of them, such as the Postmaster General, it does not appear that they are about to award contracts requiring a minimum wage stipulation pursuant to the Determination. The restraining order of the District Court (Exhibit 20 of the appellants' petition for an injunction pending appeal) was restricted to enjoining the Secretary of Labor and the Secretary of the Navy from refusing to accept any bids of three of the appellants on specified contracts about to be awarded by the Secretary of the Navy solely on the ground that the bids did not contain a stipulation agreeing to the Determination. It is submitted that any injunction pending appeal should be restricted to enjoining officers who, on facts presented by the appellants, are about to award contracts requiring a stipulation with respect to the Determination.

It is respectfully submitted that continuance of the injunction in its present terms is creating and will create confusion and uncertainty concerning its extent and operation. It is required that any injunction "shall be specific in terms; shall describe in reasonable detail * * * the act or acts sought to be restrained * * *." Rule 65 (d) of the Rules of Civil Procedure. Any injunction in this case should state in specific terms and in reasonable detail whether the appellees are restrained from continuing to enforce the Determination, not only against appellants but against all other persons and whether the injunction applies only to future advertisements for bids or applies to pending advertisements, requiring readvertisement, and to pending contracts. It is requested that an oral hearing be granted by this Court on the terms of the injunction.

III. Security for Injunction

The undersigned has been advised by the Clerk of this Court that appellants have not filed in this Court a surety bond or security for the injunction. The appellees' Objections to the injunction expressly requested, and the appellees again request, that if an injunction be continued or granted a bond should be required conditioned in favor of the Secretary of Labor, as provided in Section 2 of the Public Contracts Act, for payment of the amount of the difference between the minimum wage provided for in the Determination and the lesser minimum wages which may be paid. The laborers affected require this protection to avoid irreparable injury. Under Rule 62 (c) of the Federal Rules of Civil Procedure an injunction pending appeal may be granted "upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party." Under Rule 65 (c) "No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum

as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." In the present case laborers, particularly, who are not paid the minimum wage because of an injunction, will be irreparably damaged by any injunction and in justice and equity should be protected by adequate security required by this Court.

Furthermore, apart from security to be furnished by appellants, if any, injunction pending appeal will restrain enforcement of the Determination against bidders on future contracts other than the appellants, such other bidders should be required by the provisions of the injunction to provide a bond or other security conditioned upon payment of the minimum wages if appellants do not eventually succeed in this action.

Moreover, if any injunction pending appeal will apply to any pending contract, the injunction should provide that any contractor who fails to pay the minimum wages stipulated in the contract shall give a bond or other security to pay the minimum wages if the appellants do not eventually succeed in this case.

CONCLUSION

1. The appellees request oral reargument of the appellants' petition for an injunction pending appeal. It is submitted that the questions and practical difficulties involved in granting, interpreting, and complying with the general terms of the injunction filed March 27, 1939, set forth supra, disclose the necessity of further argument, to determine whether any injunction whatever should be granted.

2. Even if oral reargument be not granted on the question whether any injunction whatever should issue, oral argument is required to determine (a) whether any injunction should extend beyond bids by appellants upon any contracts awarded by any of the appellees before decision of the appeal and should extend to bidders other than appellants; (b) whether any injunction should extend to any invitations to bids already outstanding, requiring readvertisement of such invitations to bid; and (c) whether any injunction should extend to contracts already executed containing a stipulation to pay minimum wages.

3. Moreover, oral argument is necessary on the question of security, absolutely required for any injunction, to determine (a) whether appellants should give a bond to pay the minimum wages if the appeal fails; (b) whether bidders other than appellants should give similar bonds if the injunction is to extend to them; and (c) whether contractors on pending contracts should give similar bonds if the injunction is to extend to them.

Wherefore, in the circumstances that the parties have not been heard on the question of the actual terms of the injunction order filed March 27, 1939, and prepared by the Court and not by the parties, oral argument is requested *forthwith* on the terms of the order and the security

to be given and oral reargument of the appellants' application for an injunction pending appeal is requested.

Respectfully submitted.

EDWARD J. ENNIS,
Edward J. Ennis,
Attorney, U. S. Dept. of Justice, Attorney for appellees.

March 29, 1939.

Copy received March 29, 1939.

(Signed) FRED W. MORRISON,
Attorney for appellants.

3:57 P. M.

Exhibit A

Procurement Circular No. 6. (Proc. Cir. 6.)

WAR DEPARTMENT,
Washington, February 28, 1939.

Special purchasing procedure under the Walsh-Healey Public Contracts Act.—Paragraph 7, Section III, Procurement Circular No. 3, War Department, 1938, is amended by adding subparagraph w thereto:

w. Iron and steel articles, effective March 1, 1939.—The Secretary of Labor, under date of January 16, 1939, has made prevailing minimum wage determinations with respect to products of the iron and steel industry pursuant to Section 1, Clause B, of the Public Contracts Act, approved June 30, 1936 (Chapter 881, 49 Stat. 2036). This determination covers only pig iron, iron or steel ingots, and rolled or drawn iron or steel products as hereinafter stated, and such fabricated iron or steel products as are specifically named but does not include any unspecified coated, insulated, forged, or cast items. The definition as formulated below describes the products of the iron and steel industry and the provisions thereof do not apply to any production in open hearth and electric furnaces other than that specifically enumerated.

Following is the wage determination of the Secretary:

I hereby determine (1) That the iron and steel industry is defined to mean and include the business of producing and selling all or any one or more of the following products:

Axles—rolled or forged.
Bale ties—single loop.
Bars—alloy steel, hot-rolled.
Bars—cold finished, carbon and alloy.
Bars—concrete reinforcing, straight lengths.
Bars, ingots, blooms and billets—iron.
Bars—merchant steel.
Bars—tool steel.
Ferromanganese and spiegeleisen.
Girder rails and splice bars therefor.
Ingots, blooms, billets and slabs—alloy.

Ingots, blooms, billets and slabs—carbon.
Light rails—60 pounds or less per yard—and splice bars and angle bars therefor.
Standard tee rails of more than 60 pounds per yard—and angle bars and rail joints therefor, or any of such products.
Mechanical tubing.
Pig iron—foundry, high silicon silvery, malleable, open hearth basic, Bessemer and high silicon Bessemer.
Pig iron—low phosphorus.
Pipe—standard, line pipe and oil country tubular products.
Plates.
Posts—fence and sign.
Railroad tie plates.
Railroad track spikes.
Sheet bars.
Sheets.
Skelp (wrought iron or steel strip for making tube).
Steel sheet piling.
Strip steel—cold-rolled.
Strip steel—hot-rolled.
Structural shapes.
Tubes—boiler.
Tube rounds.
Wheels—car, rolled steel.
Wire—drawn (bare).
Wire hoops—twisted or welded.
Wire nails and staples, twisted barbless wire, barbed wire, twisted wire fence stays and wire fencing (except chain-link fencing).
Wire rods.
Wire—spring.
Wire—telephone (bare).

(2) That the prevailing minimum wages for persons employed in the manufacture of furnishing of the products of the iron and steel industry are the amounts indicated for each of the following localities whether arrived at on a time or piece-work basis:

1. 45 cents per hour in the locality consisting of the States of Louisiana, Arkansas, Mississippi, North Carolina, South Carolina, Florida, Oklahoma, Texas, Alabama, Tennessee, Georgia, Virginia, and West Virginia, (except the counties of Hancock, Brooke, Ohio, Harrison, Monongalia, and Marshall);

2. 60 cents per hour in the locality consisting of the States of Washington, Oregon, and California;

3. 60 cents per hour in the locality consisting of the States of Montana, Idaho, Nevada, Wyoming, New Mexico, Utah, Colorado, and Arizona;

4. 58½ cents per hour in the locality consisting of the States of North Dakota, South Dakota, Nebraska, Kansas, Minnesota, Iowa, Missouri, and the area in and about East Saint Louis, Illinois.

5. 62½ cents per hour in the locality consisting of the States of Wisconsin, Illinois (except the area in and about East Saint Louis, Illinois), Michigan, and Indiana;

6. 62½ cents per hour in the locality consisting of Ohio, Pennsylvania, Delaware, Maryland, Kentucky, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, and Maine, and that portion of the State of West Virginia comprised within the counties of Hancock, Brooke, Ohio, Marshall, Harrison, and Monongalia, and the District of Columbia;

Provided that apprentices may be employed at lower rates if their employment conforms to the standards of the Federal Committee on Apprenticeship.

This determination shall be effective and the minimum wages hereby established for the respective localities shall apply to all contracts awarded subject to Public Act No. 846, 74th Congress, on or after March 1, 1939.

(A. G. 400.13 (2–18–39).)

By order of the Secretary of War:

MALIN CRAIG,
Chief of Staff.

Official:
E. S. ADAMS,
Major General,
The Adjutant General.

In the United States Court of Appeals for the District of Columbia

No. 3056, Original

LUKENS STEEL COMPANY, A CORPORATION, ET AL.,
PETITIONERS-APPELLANTS

v.

FRANCES PERKINS, INDIVIDUALLY AND AS SECRETARY OF LABOR OF THE UNITED STATES, ET AL., RESPONDENTS-APPELLEES

United States Court of Appeals for the District of Columbia. Filed Apr. 1, 1939. Joseph W. Stewart, Clerk.

Appellants' objections to appellees' motion for reargument or a more specific injunction and security

Appellants respectfully submit that the above motion should in all respects be denied.

Every issue presented by such motion, whether (1) under the prayer for reargument of appellants' petition for temporary injunction pending appeal, or (2) under guise of the requests for argument (a) on the terms of the temporary injunction issued by this Court on March 27, 1939, and (b) on security therefor, has already been fully

presented to the Court in the extensive oral argument granted by the Court and in the petition, memoranda in support thereof, and objections in opposition thereto.

Entirely aside from the fact that appellees have already been accorded every reasonable opportunity to present such issues, it is respectfully submitted that each thereof was properly decided by this Court.

1. *The request in the motion for a complete oral reargument.*

In support of this branch of their motion, counsel for appellees admittedly raise no new point. Each of the points presented was completely answered in oral argument and in the petition and the memoranda in support thereof. It is respectfully submitted, for reasons therein stated at length,[13] that the action of the Court in rejecting each such point was eminently correct.

2. *The request in the motion for reargument as to the terms of the injunction.*

While in form suggesting that the injunction granted is ambiguous in its terms, counsel for appellees is in effect seeking a reargument on an issue already fully argued orally and in the petition, memoranda in support thereof, and objections in opposition thereto, viz, the character of the injunctive relief to which appellants are entitled.

The injunction granted is plain, unambiguous and specific in its terms.[14] It enjoins "appellees, and each of them, * * * from continuing in effect the determination made under date of January 16, 1939, by appellee McLaughlin," etc. As pointed out to the Court in appellants' petition and memoranda and in oral argument, and as recognized by the Court by its order, this was the only type of injunction which would

(1) preserve the *status qua ante* the Determination and accord to appellants any real relief against the irreparable injury which would otherwise be inflicted upon them by the Determination and its enforcement;[15] and

(2) prevent the chaotic situation in the award of Government iron and steel contracts, and the monopoly in connection therewith, which were threatened.[16]

The order of the Court plainly commands appellee Perkins and her two subordinates to suspend the effectiveness of the Determination pending further order of this Court—a step which should have been

[13] For a more complete discussion of the points made by counsel for appellees, the Court's attention is respectfully directed to the petition and memoranda in support thereof, as follows:
(1) Irreparable injury—See Petition, pp. 5, 15–21; Open Memo., pp. 57–58; Reply Memo., pp. 2, 15–18.
(2) Balance of conveniences: (a) The alleged damage to the public—see Petition, pp. 5–6, 27–28; Open Memo., pp. 70–71; Reply Memo., pp. 1, 19–20; (b) Alleged damage to common laborers—see Petition, pp. 6, 8, 28; Reply Memo., pp. 20–24.
(3) Probability of success on appeal—See Petition, pp. 6–22; Open Memo., pp. 3–66; Reply Memo., 25–42.
See, also, the brief for appellants on the appeal (No. 7368) and the appendix thereto, now on file with this Court.

[14] Counsel for appellees suggests that Rule 65 (d) of the Rules of Civil Procedure for the District Courts of the United States applies to action by this Court. This is plainly not the case. But, in any event, the injunction issued by this Court fully accords with such rule.

[15] See Petition, pp. 5, 25–26; Open Memo., pp. 67–70; Reply Memo., pp. 43–44.

[16] See Petition, pp. 5–6, 27–28; Open Memo., pp. 67, 70–71; Reply Memo., pp. 1, 19–20.

taken voluntarily if for no other reason than the injury to the public interest threatened by a continuation of the effectiveness of the Determination,—and orders the other appellees to take the same action which they would have taken had the Secretary of Labor voluntarily suspended the effectiveness of the Determination as aforesaid.

This does not create a situation with which appellees are unfamiliar. As appears from paragraph 47 of the Complaint (Exhibit 1 to the Petition), appellee McLaughlin postponed the effectiveness of the Determination on January 30, 1939, one day before it was originally scheduled to become effective (Complaint, Par. 44). Invitations to bid on various contracts to be awarded after January 31, 1939, were then outstanding. It had been ruled by the Labor Department that such contracts were subject to the Determination. Consequently, the postponement of the effectiveness of the Determination created a situation parallel to that created by this Court's order requiring the Secretary of Labor to suspend the effectiveness of the Determination. Presumably the same departmental routine as was followed when the Acting Secretary voluntarily rendered the Determination ineffective may be followed now.

In any event, it is not the function of this Court to advise appellees on the minutiae of departmental routine to be followed in carrying out the plain and unambiguous order of the Court.

In the motion it is stated that there are "difficulties in interpreting the injunction"; but, it is respectfully submitted, that the only real difficulty is a reluctance to admit that this Court should have done what it did—that the Court meant what it said.

In so far as outstanding invitations to bid on contracts to be awarded in the future are concerned, the order of this Court makes it perfectly clear that no effect may be given to the Determination in connection with the award of such contracts. That is to say, these situations must be handled in exactly the same manner as they would have been handled had the Secretary of Labor voluntarily withdrawn the Determination. Consequently, appellee contracting officers are required by law to take (in the light of the circumstances of each particular case) such steps as are appropriate in order to comply with R. S. sec. 3709 which, as the Court will recall, requires competitive bidding, after advertising, on public contracts, and the award thereof to the lowest responsible bidder.

In the case of one such instance, with which counsel for appellants happen to be familiar, the Navy Department, on March 27, 1939, dispatched telegrams to prospective bidders on a contract on which bids were to be opened on March 29, 1939, stating that the Determination did not apply thereto.

It is most significant in this regard that the motion makes no mention of the number of such situations existing[16] and merely states

[16] Counsel for appellants know of only two such situations: (1) the proposed contract referred to in Exhibit 16 to the petition which should have been awarded to appellant Alan Wood, since bids thereon were opened on February 6, 1939 (Petition, p. 21), but which has been readvertised; and (2) a contract (Requisition No. 735, Bureau NSAF, dated February 23, 1939), for steel sheets, to be let by the Norfolk Navy Yard, Portsmouth, Virginia, on which bids are scheduled to be opened on April 3, 1939.

that "it *may* be necessary * * * to readvertise such invitations to bid in order that all bidders may be on an equal basis. Some bidders *may* have already submitted bids agreeing to the prior enforcement of the Determination."

In so far as contracts already awarded are concerned, the "difficulties in interpreting the injunction" are likewise nonexistent. The temporary injunction no more purports to affect such contracts than would a voluntary revocation by the Secretary of Labor of the Determination. The mere revocation of the Determination would not in any way affect such contracts. The question whether such contracts are invalid because the Determination is illegal [17] is a wholly different question, not created in any way by the injunction, but resulting from the refusal of the Secretary of Labor voluntarily to postpone the effective date of the Determination until its validity could be determined in this litigation.

Certainly, the doubt as to the legality of contracts let from March 1, 1939, to March 27, 1939, the date of this Court's order, which doubt has been created by the acts of the appellees, affords no basis for continuing the Determination in effect, in whole or in part, and thereby tainting with illegality every other contract to be let in the future.

From what has been said it is perfectly plain that counsel for appellees is really not concerned with the form of this Court's injunction, but with the *substance* thereof. However, if counsel would prefer a longer form of order, we would, of course, have no objection to the entry of an order in the form submitted by us as Schedule A to the petition which spells out with the greatest particularity what the Court has provided for in its order of March 27, 1939.

3. *The request for security on behalf of others than the appellees.*

Appellees request a bond "conditioned in favor of the Secretary of Labor, as provided in Section 2 of the Public Contracts Act, for payment of the amount of the difference between the minimum wage provided for in the Determination and the lesser minimum wages which may be paid." From the context, and since it is stated that the same request was made in appellees' objections to the petition, we understand that the bond which it is requested that the Court order appellants to post would apply to "any Government contracts which the appellants may obtain" (appellees' objections, p. 13).

This contention was rejected by the Court in its order of March 27, 1939, as it was by the District Court at the time of entry of its temporary restraining order.

To support the motion to reargue this question, counsel for appellees relies, for some unexplained reason, on Rule 65 (c) of the Rules of Civil Procedure for the District Courts of the United States, providing that "No such restraining order or preliminary injunction shall issue except upon the giving of security * * * in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrong-

[17] See Note 4, *supra*.

fully enjoined or restrained". It is difficult to comprehend how this Rule advances counsel's suggestion, since security is not requested on behalf of any one enjoined by the order of March 27, 1939, and since counsel has expressly conceded [18] that appellees "would suffer no especial injury as a result of the granting of the stay".

Appellees' counsel also refers to Rule 62 (c) of such Rules, which has no more pertinence than Rule 65 (c) and is, moreover, made expressly inapplicable to the action of this Court by Rule 62 (g), which states:

"The provisions in this Rule [62] do not limit any power of an appellate court * * * to stay proceedings during the pendency of an appeal or to sustain, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered; * * *."

The only basis advanced for the suggested bond is the conclusory statement that "laborers, particularly, who are not paid the minimum wage because of an injunction, will be irreparably damaged by any injunction." But, as pointed out in the detailed analysis set forth in appellants' Reply Memorandum (pp. 21–24), it is extremely doubtful that *any* employer affected by the Determination, not now paying the minimum wages fixed by the Determination, would bid upon and accept the award of any Government contract so long as the Determination remains in effect and the validity thereof is not settled, since to do so would be to agree to the unlawful Determination. Certainly appellants could not, since to do so would render their appeal moot (see Petition, p. 18; Reply Memo., p. 2). Consequently, there is no showing that any laborers will be irreparably damaged "because of" or "by any injunction."

Certainly, any damage is much more speculative than that involved in *Oklahoma Utilities Company* v. *Ickes et al.*, No. 6509, decided by this Court July 9, 1935 (see Reply Memo., p. 23). In granting its preliminary injunction pending appeal in that suit, and thereby enjoining a P. W. A. loan to a municipality for the purpose of constructing competitive utility facilities which, it was claimed, would afford cheaper power to the consuming public, this Court did not require any bond for the benefit of the municipality or the consuming public.

Moreover, to require appellants to post any such bond would be to place bidders for iron and steel contracts on different footings and therefore render such contracts illegal under R. S. sec. 3709. It is presumably because of recognition of this that counsel for appellees now suggests that the Court further order that all bidders, whether or not before the Court, be required to post similar bonds "conditioned upon payment of the minimum wages" prescribed in the Determination "if appellants do not eventually succeed in this action." How the Court could impose this unusual condition upon other bidders, however, is not explained.

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[18] Appellees' Objections to the Petition, p. 13.

Passing by this insuperable obstacle, however, it is immediately apparent that the requirement that any such bond be posted by appellants would substantially defeat a principal object of the injunction. If such a bond were required, appellants, as a practical matter, in bidding under such circumstances, would be required to bid at prices sufficiently high to permit payment of the wages required by the Determination.[19] But if they bid at such prices, they will presumably be unable to compete successfully with large, fully integrated companies having plants in more favorable geographical positions in the West and South whose wage rates are not increased by the Determination.

Respectfully submitted.

O. MAX GARDNER,
O. Max Gardner,
ROBERTS B. THOMAS,
FREDERICK H. KNIGHT.
Attorneys for Petitioners-Appellants.

MARCH 31, 1939.

Service is hereby acknowledged this 1st day of April 1939 of a copy of the foregoing Objections.

EDWARD J. ENNIS.
Attorney for Appellees.

Tuesday, April 4th, A. D. 1939

* * * * * * * * *

Before Honorable JUSTIN MILLER, HENRY W. EDGERTON, and FRED M. VINSON, Associate Justices

* * * * * * * * *

No. 7368

LUKENS STEEL COMPANY, A CORPORATION, ALAN WOOD STEEL COMPANY, A CORPORATION, SOUTH CHESTER TUBE COMPANY, A CORPORATION, APPELLANTS

vs.

FRANCES PERKINS, INDIVIDUALLY AND AS SECRETARY OF LABOR OF THE UNITED STATES, CHARLES V. MCLAUGHLIN, INDIVIDUALLY AND AS ASSISTANT SECRETARY OF LABOR OF THE UNITED STATES, L. METCALFE WALLING, INDIVIDUALLY AND AS ADMINISTRATOR OF THE DIVISION OF PUBLIC CONTRACTS OF THE DEPARTMENT OF LABOR OF THE UNITED STATES, ET AL.

Mr. Charles Edward Rhetts, United States Department of Labor, member of the Illinois Bar, and Mr. John F. Budke, were introduced to the Court by Mr. Edward J. Ennis. Mr. Rhetts was allowed to argue on behalf of the appellees herein. Mr. Budke's motion for

[19] In this connection, it is to be borne in mind that an increase in the present minimum wages paid by appellants to common laborers employed in the performance of Government contracts would, from a practical standpoint, necessitate a corresponding increase in the wage rates for all classes of wage-earners employed, and all classes of work done, by appellants.

leave to file brief as amicus curiae on behalf of Parkersburg Steel Company was granted. Mr. Joseph Kovner was recognized by the Court for the purposes of this case.

Committee of Industrial Organizations was allowed fifteen minutes in argument herein in addition to one hour for the appellees; appellants were allowed additional time correspondingly.

The argument in the above-entitled cause was commenced by Mr. Frederick H. Knight, attorney for appellants, continued by Messrs. O. Max Gardner, attorney for appellants, Edward J. Ennis and Charles Edward Rhetts, attorneys for appellees, Joseph Kovner, attorney for Steel Workers Organizing Committee, Frederick H. Knight, attorney for appellants, and concluded by Mr. O. Max Gardner, attorney for appellants.

The argument in the above-entitled cause on the motion for reargument of the motion for a temporary injunction herein or an order clarifying and stating the extent of the injunction already granted, and determination of the security therefor, was commenced by Mr. Edward J. Ennis, attorney for appellees, and concluded by Mr. Frederick H. Knight, attorney for appellants.

* * * * * * *

United States Court of Appeals for the District of Columbia

No. 3056 Original

LUKENS STEEL COMPANY, A CORPORATION, ALAN WOOD STEEL COMPANY, A CORPORATION, SOUTH CHESTER TUBE COMPANY, A CORPORATION, ET AL., APPELLANTS

v.

FRANCES PERKINS, INDIVIDUALLY AND AS SECRETARY OF LABOR OF THE UNITED STATES, CHARLES V. MCLAUGHLIN, INDIVIDUALLY AND AS ASSISTANT SECRETARY OF LABOR OF THE UNITED STATES, L. METCALFE WALLING, INDIVIDUALLY AND AS ADMINISTRATOR OF THE DIVISION OF PUBLIC CONTRACTS OF THE DEPARTMENT OF LABOR OF THE UNITED STATES, ET AL.

United States Court of Appeals for the District of Columbia. Filed Apr. 13, 1939. Joseph W. Stewart, Clerk.

Motion to dissolve temporary injunction pending appeal

Appellees respectfully move this court to dissolve any temporary injunction pending appeal herein, either forthwith or immediately upon any vote or decision of the members of this court to affirm the appeal heretofore argued herein and without awaiting preparation of any opinion of this court on such decision. The purpose of this motion is to obtain a dissolution of any temporary injunction pending appeal at the earliest possible moment upon any decision of

affirmance without awaiting the preparation of the opinion of this court.

Respectfully submitted.

(Signed) EDWARD J. ENNIS,
Edward J. Ennis,
Attorney for appellees.

APRIL 12, 1939.

Receipt of copy of above motion acknowledged.

(Signed) FRED W. MORRISON,
Attorney for Appellants.

April 13, 1939—11:45 A. M.

United States Court of Appeals for the District of Columbia

No. 7368

LUKENS STEEL COMPANY, A CORPORATION, ALAN WOOD STEEL COMPANY, A CORPORATION, SOUTH CHESTER TUBE COMPANY, A CORPORATION, APPELLANTS

v.

FRANCES PERKINS, INDIVIDUALLY AND AS SECRETARY OF LABOR OF THE UNITED STATES, CHARLES V. MCLAUGHLIN, INDIVIDUALLY AND AS ASSISTANT SECRETARY OF LABOR OF THE UNITED STATES, L. METCALFE WALLING, INDIVIDUALLY AND AS ADMINISTRATOR OF THE DIVISION OF PUBLIC CONTRACTS OF THE DEPARTMENT OF LABOR OF THE UNITED STATES, ET AL.

Appeal from the District Court of the United States for the District of Columbia

Decided August 4, 1939

Roberts B. Thomas, of New York City, O. Max Gardner, of Washington, D. C., and Frederick H. Knight, of Philadelphia, Pennsylvania, for appellants.

Edward J. Ennis, of Washington, D. C., for appellees. (Charles E. Rhetts, of Washington, D. C., who is not a member of the bar of this Court, was recognized especially for the purposes of this case and permitted to argue on behalf of appellees.)

By leave of Court, Joseph Kovner, of Washington, D. C., filed a brief on behalf of Steel Workers Organizing Committee as amicus curiae.

By leave of Court, R. M. O'Hara, of Washington, D. C., filed a brief on behalf of The Andrews Steel Company, et al. as amicus curiae.

By leave of Court, John F. Budke, of Franklin, Pennsylvania, filed a brief on behalf of The Parkersburg Iron & Steel Company as amicus curiae.

Before MILLER, EDGERTON, and VINSON, Associate Justices.

PER CURIAM: This cause was specially set down for argument on the appellants' (plaintiffs') petition for an injunction against the above-named appellees (defendants) restraining them from continuing in effect a determination made under date of January 16, 1939, by Appellee McLaughlin, as Acting Secretary of Labor, pursuant to "An Act To provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes.", approved June 30, 1936. We had previously granted an injunction pendente lite, which will be continued in effect.

The case was fully argued at the hearing and has been given due consideration. Justices Miller and Vinson are of opinion that the complaint states a valid cause of action entitling the plaintiffs to an injunction as prayed therein and, therefore, are of opinion that the District Court was in error in dismissing the complaint. The grounds of this court's opinion will be filed shortly, and Justice Edgerton will file a dissenting opinion. A judgment will thereupon be entered remanding the cause to the District Court, with instructions to set aside and vacate its previous order dismissing the complaint, and directing that court to proceed in accordance with the opinion of this court.

United States Court of Appeals for the District of Columbia

No. 7368

LUKENS STEEL COMPANY, A CORPORATION, ALAN WOOD STEEL COMPANY, A CORPORATION, SOUTH CHESTER TUBE COMPANY, A CORPORATION ET AL., APPELLANTS

v.

FRANCES PERKINS, INDIVIDUALLY AND AS SECRETARY OF LABOR OF THE UNITED STATES, CHARLES V. MCLAUGHLIN, INDIVIDUALLY AND AS ASSISTANT SECRETARY OF LABOR OF THE UNITED STATES, L. METCALFE WALLING, INDIVIDUALLY AND AS ADMINISTRATOR OF THE DIVISION OF PUBLIC CONTRACTS OF THE DEPARTMENT OF LABOR OF THE UNITED STATES, ET AL.

Appeal from the District Court of the United States for the District of Columbia

Decided October 3, 1939

Roberts B. Thomas, of New York City, O. Max Gardner, of Washington, D. C., and Frederick H. Knight, of Philadelphia, Pennsylvania, for appellants.

Edward J. Ennis, of Washington, D. C., for appellees. (Charles E. Rhetts, of Washington, D. C., who is not a member of the bar of this Court, was recognized especially for the purposes of this case and permitted to argue on behalf of appellees.)

By leave of Court, Joseph Kovner, of Washington, D. C., filed a brief on behalf of Steel Workers Organizing Committee as amicus curiae.

By leave of Court, R. M. O'Hara, of Washington, D. C., filed a brief on behalf of The Andrews Steel Company et al., as amicus curiae.

By leave of Court, John F. Budke, of Franklin, Pennsylvania, filed a brief on behalf of The Parkersburg Iron & Steel Company as amicus curiae.

Before MILLER, EDGERTON, and VINSON, Associate Justices.

MILLER, Associate Justice: In 1936, Congress enacted a statute [20] which, among other things, provides that "in any contract made and entered into by any * * * agency * * * of the United States * * * for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included * * *" five representations and stipulations, the second of which reads as follows: [21]

"That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the *locality* in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;" [Italics supplied.]

The complaint filed by appellants in the lower court alleged that on or about January 16, 1939, Appellee McLaughlin, purporting to act pursuant to the statute, issued a determination—in which Appellee Perkins actively participated, and which she authorized, approved and consented to—determining:

"(2) That the prevailing minimum wages for persons employed in the manufacture or furnishing of the products of the Iron and Steel Industry are the amounts indicated for each of the following *localities* whether arrived at on a time or piece work basis:

* * * * * * *

"6. 62½ cents per hour in the *locality* consisting of Ohio, Pennsylvania, Delaware, Maryland, Kentucky, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, and Maine, and that portion of the State of West Virginia comprised within the counties of Hancock, Brooke, Ohio, Marshall, Harrison, and Monongalia, and the District of Columbia;" [Italics supplied.]

This determination was challenged in the lower court, and is challenged here, as void, beyond the authority of the Appellees Perkins and McLaughlin to make arbitrary and capricious, and wholly without warrant or authority of law; particularly in its employment of the

[20] Public Contracts Act, June 30, 1936, 49 Stat. 2036, 41 U. S. C. A. § 35 *et seq.* (Supp. 1938).

[21] 49 Stat. 2036, 41 U. S. C. A. § 35 (b) (Supp. 1938).

word *locality* to describe an area consisting of thirteen states, a portion of a fourteenth, and the District of Columbia as well. The challenge is well justified and the lower court erred in dismissing the complaint. The determination in this particular is not only unwarranted but incongruous.

It is true that the word *locality* is one of somewhat indefinite meaning.[22] Still, its indefiniteness has certain well recognized limits in common meaning and usage,[23] which exclude and forbid the interpretation placed upon the word by the appellees in their determination. It is true that within the proper limits of the meaning of *locality*, the Secretary is required by the statute to exercise judgment and discretion; but the determination in this case goes so far beyond any possible proper application of the word as to defeat its meaning and to constitute an attempt arbitrarily to disregard the statutory mandate. The rule therefore—that where the adoption of one of several possible interpretations of a doubtful statute involves the exercise of judgment and discretion, upon which the duty of an officer to perform a particular act depends, the courts cannot control the exercise of that discretion;[24]—has no application in the present case.[25]

Popular acceptance and usage accord to the word *locality* connotations of common interest and understanding, such as are revealed in the following expressions: Local self-government,[26] our local schools, local interests, a local concern,[27] local option,[28] local boy makes good, local items as used in newspapers, local prejudices, local talent.[29] Its meaning is suggested also by such terms as local anesthetic, and *location* as used in mining law,[30] and in motion picture parlance. In ordinary and common usage *locality* is synonymous in meaning with such words as *place*, *vicinity*, *neighborhood*, and *community*.[31] These words, also, are too indefinite to be used for purposes of exact measurement in terms of acres or square miles.[32] But neither they nor *locality*

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[22] Connally v. General Construction Co., 269 U. S. 385, 394. See Murphy v. Worcester Consol. St. Ry., 199 Mass. 279, 287–288, 85 N. E. 507, 510; Foster v. Hart Consol. Min. Co., 52 Colo. 429, 435, 122 P. 54, 55.

[23] State v. Tibbetts, 21 Okla. Cr. 168, 205 P. 776, 779.

[24] Wilbur v. United States ex rel. Kadrie, 281 U. S. 206, 219; Work v. United States ex rel. Rives, 267 U. S. 175, 177; United States ex rel. Dunlap v. Black, 128 U. S. 40, 48; United States ex rel. Hall v. Payne, 254 U. S. 343; United States ex rel. White v. Cox, 95 F. (2d) 347, 349, 68 App. D. C. 218, 220.

[25] Red Canyon Sheep Co. v. Ickes, 98 F. (2d) 308, 322, 69 App. D. C. 27, 41. See Santa Fe Pacific R. R. v. Lane, 244 U. S. 492; White v. Macy, 246 U. S. 606; Procter & Gamble Co. v. Coe, 96 F. (2d) 518, 68 App. D. C. 246, cert. denied, 305 U. S. 604.

[26] Rathbone v. Wirth, 6 App. Div. 277, 280, 40 N. Y. S. 535, 542.

[27] Little Rock v. North Little Rock, 72 Ark. 195, 204, 79 S. W. 785, 788.

[28] People v. Capell, 55 Cal. App. 461, 463, 203 P. 837, 838; State ex rel. Hoover v. Hickerson, 130 Mo. App. 47, 50, 109 S. W. 108, 109.

[29] See also: Local administration (Workman v. Mayor, S. D. N. Y., 63 F. 298, 304); local affairs (Brooklyn City R. Co. v. Whalen, 191 App. Div. 737, 740, 182 N. Y. S. 282, 285); local authorities (In re Rochester Electric Ry. Co., 123 N. Y. 351, 356, 25 N. E. 381, 382); local benefits (Rankin v. Yoran, 72 Ore. 224, 230, 143 P. 894, 896); local commercial broker (Stratford v. City Council, 110 Ala. 619, 625, 20 So. 127, 128); local drainage (Ford v. Toledo, 64 Ohio St. 92, 97, 59 N. E. 779, 781); local habitation (Greenlee v. Marks, 62 Ind. 418, 420); local officer (People ex rel. Baird v. Nixon, 156 N. Y. 221, 227, 52 N. E. 1117, 1118); local police, (State ex rel. Walsh v. Hine, 59 Conn. 50, 60, 21 A. 1024, 1025); local property (San Francisco & S. J. V. Ry. v. Stockton, 149 Cal. 85, 90 84 P. 771, 774); local purpose (State ex rel. Adsit v. Allen, 1 Lans. [N. Y.] 248, 251); local freight (Murphy v. Worcester Consol. St. Ry., 199 Mass. 279, 287, 85 N. E. 507, 510).

[30] Smelting Co. v. Kemp, 104 U. S. 636, 649.

[31] Connally v. General Construction Co., 269 U. S. 385, 394–395; State v. Tibbetts, 21 Okla. Cr. 168, 205 P. 776, 779.

[32] Connally v. General Construction Co., 269 U. S. 385, 395.

itself, in any case, connote large geographical areas, with widely diverse interests, such as the fourteen states and the District of Columbia, grouped in the protested determination. The word *place*, in its ordinary significance, has a distinctly limited meaning as is indicated by such expressions as place of birth, place of origin, the old home place, ore in place, and by the word placement as used in the game of tennis. Would a jury from the *vicinity* of Brooklyn be acceptable—within the well known rule [33]—for the trial of an accused person in St. Lawrence County, New York, to say nothing of Sussex County, Delaware? Would it be a normal use of the word to say that folks in Van Buren, Maine, *neighbor* with those in the District of Columbia, or in Monongalia County, West Virginia? To ask these questions is to answer them. The word *community* [34] connotes a congeries of common interests arising from associations—social; business, religious, governmental, scholastic, recreational—involving considerations of public health, fire protection, water, sewage, transportation, and other services, which bind together the people of such a community or set them quarreling with each other. The only community of interest revealed by the determination in the present case is steel and iron manufacture. It could almost as well be said that because Esperanto groups throughout the world have a community of interest, the whole world is a locality. . . .

Words which approximate in meaning the definition contended for by appellees are *area*, *region*, *province*, *territory*, *river basin*, *drainage area*, *watershed*. In the Report of the Public Contracts Board [35]—and upon which it is alleged that the protested determination was based—the words *area* and *region* are used throughout. The Report reveals that no attention was paid therein to the concept of *locality* specified in the statute. In fact, the basis of the determination—assuming the correctness of appellants' allegations, as we are bound to do upon a motion to dismiss [36]—is revealed throughout the Report by such language as the following: "The predominant minimum wage practice in this industry comes to light only when we view the practice of the industry *as a whole* or over broad *regional areas*." [Italics supplied]; and again by the following language: "These various *producing centers* occupy relatively small *areas* and none of them

[33] 2 Cooley's Bl. Comm. (4th ed. 1899) 1491 (Book IV) *350: "When, therefore, a prisoner on his arraignment has pleaded not guilty, and for his trial hath put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors, liberos et legales homines, de vicineto: that is, freeholders, without just exception, and of the visne or neighbourhood; which is interpreted to be of the county where the fact is committed"; Chicago v. Knobel, 232 Ill. 112, 114, 83 N. E. 459, 460: "* * * under the common law, in both civil and criminal cases, the jury were to be taken from the visne or neighborhood—from among the neighbors and equals of the litigants, or the accused—and by long usage this came to mean from the body of the county"; Commonwealth v. Collins, 268 Pa. 295, 300, 110 A. 738, 739. See Callan v. Wilson, 127 U. S. 540, 549; Clement v. United States, 8 Cir. 149 F. 305, 310, cert. denied, 206 U. S. 562; Spencer v. United States, 8 Cir. 169 F. 562, 565.

[34] Holmes, The Common Law (1881) 41: "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the *community*, whether right or wrong." [Italics supplied.]

[35] Appointed by the Secretary of Labor, October 6, 1936.

[36] Ickes v. Fox, 300 U. S. 82, 96; Ickes v. Virginia-Colorado Development Corp., 295 U. S. 639, 646; National Remedy Co. v. Hyde, 50 F. (2d) 1066, 1067, 60 App. D. C. 252, 253.

can be called *geographic regions*. It should be noted that the variations in base rates between a majority of the *producing centers* are not wide. * * * The question here is whether these relatively small wage variations between relatively *small geographical areas* should be made the basis for separate findings of prevailing minimum wages which would be limited to the *locale* of the variation." [Italics supplied.] The Report and the determination both answered the question in the negative; deliberately rejecting the delegation of power given by the statute and assuming a power neither given nor intended thereby.[37]

It is significant that appellees cite no cases which support or suggest a meaning for the word *locality* comparable in geographical area or scope with the meaning given to it in the protested determination. But they argue that the use of the word *locality* in the Public Contracts Act in preference to the language "city, town, village, or other subdivision of the state" which is used in the Davis-Bacon Act[38] "clearly discloses the congressional intent that the word 'locality' shall not be restricted to a civil subdivision of the state." In this they are no doubt correct. Congress obviously had in mind a local center of manufacture. This might lie entirely within a civil subdivision; but on the other hand it might overlap from one civil subdivision to another, or perhaps it might even overlap a state line. In order to avoid the difficulties inherent in a mandate to determine minimum wages paid within such civil subdivisions, Congress, instead, kept in mind the habits of industry itself, which frequently disregards imaginary

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[37] Equally revealing are the following apparently inadvertent uses of the word *locality* and its variants, which appear in the Report: "No particular *locale* marks out the *location* of the plants paying the base rates from 50 to 55 cents. These rates are found in *localities* eastward from Marion, Ohio, into New England. * * * "Turning now to the subject of geographical location we refer back to the table on pages 79 and 84 for a detailed listing by *location* of the plants in which the base rates above 54 cents are paid. It will be found that the base rates are paid in the following *locations:* 55.0—New England; near Buffalo; central Ohio and Indiana; Kansas City and St. Louis, Missouri. 56.0—Kentucky; West Virginia; Philadelphia; western Illinois. 56.25—Central Ohio. 56.5—Sparrows Point, Maryland; Philadelphia *vicinity;* eastern and central Pennsylvania; northern New Jersey; Syracuse, New York; central Ohio; St. Louis *vicinity.* 57.0—Philadelphia and *vicinity;* eastern Pennsylvania; northern New Jersey; New England. 58.0—California; New England. 58.5—Johnstown, Pennsylvania; central Ohio; St. Louis *vicinity.* 59.5—Buffalo and *vicinity;* Philadelphia; central Indiana; Chicago *vicinity.* 60.0—Pittsburgh *vicinity;* Buffalo *vicinity;* Duluth, Minnesota; central Indiana; Chicago *vicinity;* Colorado; Utah; California; Washington. 60.5—Central Ohio. 62.5—Chicago and *vicinity;* Gary and *vicinity;* Michigan; central Ohio; Kentucky; Cleveland and *vicinity;* Youngstown and *vicinity;* Pittsburgh and *vicinity;* West Virginia; New Jersey; New England. 63.0—Michigan. 63.5—Pittsburgh. 65.0—California; Michigan. 70.0—Michigan. It will be observed that none of the rates is paid exclusively in any one *geographic area* except in the few instances where there is only a single plant paying one of the rates. The summary of plant *location* in connection with the base rates shows that each of the outstanding base rates is paid by plants spread across the Middle West and the East. For instance, 56.5, 58.5, 59.5, and 62.5 cents are paid in plants *located* in the Middle West and east of Pittsburgh. The Western plants are represented in the scale by the base rates of 58, 60, and 65 cents. These rates are also paid in the Middle West and east of Pittsburgh. While it is apparent that no portion of the wage scale can be assigned exclusively to New England, or east of Pittsburgh, or the Middle West or the West, it is a fact that in a good many *localities* and areas over the breadth of the country one or another of the base rates is paid to more workers than is any of the other rates. The industry is spread between the four corners of the country. The geographic limits of the industry are as wide apart as Portland, Maine; Seattle, Washington; Duluth, Minnesota; and Fort Worth, Texas. There are plants in 20 states and every section of the country has a share in the production of iron and steel and their products. In some parts of the country the plants are sparsely distributed and in other places they are thickly concentrated around a *center* or production. The plants are *located* in or around the large and middle-sized cities, in small *communities*, and even in rural *areas*. It is to be expected that differences in *location* would be reflected in different base rates." [Italics supplied.]

[38] Act of March 3, 1931, 46 Stat. 1494, as amended by Act of August 30, 1935, 49 Stat. 1011, 40 U. S. C. A. § 267a (Supp. 1938).

political boundary lines, and establishes itself in economically strategic positions, determined by supplies of raw material and labor, and facilities for marketing, such as water and rail transportation. Localities develop in much the same manner as do industrial centers. A combination of a river, a rough mountainous terrain, deposits of coal and iron, and a hardy, independent people, is apt to produce a community, a neighborhood, which may in turn become a city or town, which may result in the formation of a county; but which, on the other hand, may be less or greater in area than such arbitrary political subdivisions. Sometimes such localities precede and sometimes follow the development of industrial and production centers.

It is vitally significant that Congress in its effort to deal with such industrial centers—rather than with civil subdivisions—did not use a word such as region or area, which might have been susceptible of the meaning for which appellees contend. It chose instead a word of limited meaning, long and well known to those acquainted with the American tradition. It is a settled rule of statutory construction that Congress will be presumed to have used language in its usual significance and in accordance with common understanding.[39]

Appellees contend that to attribute to the word locality a limited—i. e., its well-settled—meaning would produce difficult and objectionable problems of administration. While this may be true, it constitutes no reason for disregarding the clearly expressed intention of Congress. Administrative convenience and public interest may, under some circumstances, coincide. But it is not always so. Governmental functions may involve a multiplicity of administrative details. It would no doubt be much more convenient for the Postmaster General if a few large centers could be used for the collection and distribution of mail. But in that case, as in the present, Congress has spoken in terms of governmental service to be performed on a basis of *localities;* with all the administrative inconvenience which may follow the carrying out of its mandates. If the language used by Congress had been obscure, then the argument of hardship and inconvenience might be persuasive. "But considerations of this nature can never sanction a construction at variance with the manifest meaning of the legislature, expressed in plain and unambiguous language."[40] If the language is plain and the meaning clear, the duty of interpretation does not arise and the sole function of the courts is to enforce the statute according to its terms.[41]

Again, appellees contend that their interpretation should be adopted by virtue of the rule that an administrative construction consistently adhered to and not plainly erroneous should be followed by the courts.

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[39] United States v. Wurts, 303 U. S. 414, 417; Old Colony Trust Co. v. Commissioner of Internal Revenue, 301 U. S. 379, 383; DeGanay v. Lederer, 250 U. S. 376, 381; Union Pacific R. R. v. Hall, 91 U. S. 343, 347; Caminetti v. United States, 242 U. S. 470, 485-486.

[40] Evans v. Jordan and Morehead, 9 Cranch. [U. S.] 199, 203. See United States v. Fisher, 2 Cranch. [U. S.] 358, 386; Crooks v. Harrelson, 282 U. S. 55, 60.

[41] Caminetti v. United States, 242 U. S. 470, 485. See, United States v. Lexington Mill & Elevator Co., 232 U. S. 399, 409; Dewey v. United States, 178 U. S. 510, 520-521. See also Houghton v. Payne, 194 U. S. 88, 100.

That rule, if applicable under the circumstances of the present case, would bar judicial review of administrative action in all cases. The statute under which appellees purport to act was not approved until June 30, 1936, just two years and eight months prior to the filing of the complaint in this case; the Public Contracts Board was not created until October 6, 1936; the Report of the Public Contracts Board was dated October 27, 1938; and the protested Determination was not issued until January 16, 1939, *forty days* prior to the filing of the complaint in the present case. The record is bare of any showing of "administrative construction consistently adhered to" except the bald assertion to that effect contained in the Determination itself, dated January 16, 1939, and upon which appellees rely. In other words, we are asked to respect and follow an administrative construction first announced only forty days prior to the commencement of suit to challenge that construction.

The rule which appellees seek to apply, as revealed by the cases upon which they rely, relates to construction and practice of long standing,[42]—revealed by the issuance of regulations,[43] granting of permits [44] and otherwise [45]—made known to Congress [46] and acquiesced in by it.[47] Moreover, the rule relates to the interpretation of an ambiguous or doubtful statute, not one plain on its face as in the present case. "A custom of the department, however long continued by successive officers, must yield to the positive language of the statute." [48] Obviously, therefore, the rule has no application here.

The clearly expressed purpose of the statute is that the Secretary shall determine "the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished * * *" [49] and not that he shall impose upon such local industries "the predominant minimum wage practice" of the industry viewed "as a whole or over broad regional areas." To permit the Secretary to establish a minimum wage scale for the area embraced within fourteen States and the District of Columbia would be to defeat rather than to accomplish the purpose of the Act.[50] Under the circumstances it is not necessary to look farther to discover the legislative intent. But if there were any element of vagueness or uncertainty in the language used, either as to the purpose of the Act

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[42] Swendig v. Washington Water Power Co., 265 U. S. 322, 331; Wisconsin v. Illinois, 278 U. S. 367, 413 (thirty years).
[43] Brewster v. Gage, 280 U. S. 327, 336–337.
[44] Wisconsin v. Illinois, 278 U. S. 367, 414.
[45] Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U. S. 315, 329 (opinion of Patent Office); Wisconsin v. Illinois, 278 U. S. 367 (opinion of Attorney General).
[46] Wisconsin v. Illinois, 278 U. S. 367.
[47] United States v. Shreveport Grain & Elevator Co., 287 U. S. 77, 84; Santa Fe Pacific R. R. v. Lane, 244 U. S. 492, 496.
[48] Houghton v. Payne, 194 U. S. 88, 100; Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U. S. 315, 330–331; Brewster v. Gage, 280 U. S. 327, 336; Swendig v. Washington Water Power Co., 265 U. S. 322, 331; Louisville & Nashville R. R. v. United States, 282 U. S. 740, 757, 759; Texas & Pacific Ry. v. United States, 289 U. S. 627, 640; United States v. Tanner, 147 U. S. 661.
[49] 49 Stat. 2036, 41 U. S. C. A. § 35 (b) (Supp. 1938).
[50] See Webster v. Luther, 163 U. S. 331, 342.

in using the word locality [51] or as to the intent of Congress that the Secretary of Labor should not be empowered thereby to fix wages,[52] it would be eliminated immediately by reference to explanations given on the floor of the House by those in charge of the measure.

Appellees contend that the present suit is in fact one against the United States: that the latter is an indispensable party which, not having given its consent, cannot be sued. It is true, as a general rule, that the United States is an indispensable party in certain suits in which the judgment or decree rendered may substantially affect its interests;[53] but all suits against public officers do not fall within the operation of that rule.[54] Thus, it has long been recognized that an officer who acts outside the scope of his jurisdiction and without authorization of law may be liable even in damages for injuries suffered by a citizen as a result thereof.[55] And the Supreme Court has in numerous instances approved the use of injunction process in clear cases of illegal action or threatened illegal action by public officers.[56]

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[51] Wright v. Vinton Branch, 300 U. S. 440, 463, and cases there cited in note 8. Extracts from CONGRESSIONAL RECORD, Vol. 80, Part 9, 74th Cong., 2d Sess.:
(Page 9992.)
"Mr. GREENWOOD. Mr. Speaker, this resolution from the Committee on Rules provides for consideration of what is known as the Walsh-Healey Bill, which bill regulates specifications in connection with the purchase of supplies by the Government of the United States. It provides that no less than the prevailing minimum wage shall be paid to workers in the community where the supplies are manufactured or where the work is performed."
(Page 9993.)
"Mr. GREENWOOD. This bill provides that they shall pay the prevailing wages in the community where the work is performed; so the bill takes care of the very proposition of which the gentleman speaks."
(Page 10008.)
"Mr. CITRON. The bill before us is in substance an extension of the Bacon-Davis Act to all Government purchases amounting to over $10,000.
* * * * * * *
"The bill merely provides that the Government shall have the right to refuse the bids on all purchases over $10,000 to those * * * (4) who pay less than the prevailing rate of wages in their community. * * *"

[52] The original bill introduced by Congressman Healey (H. R. 11554, 74th Cong., 2d Sess.) contained the following language: "* * * minimum wages fixed under this Act shall be such wages as are fairly and reasonably commensurate with the value of the service or class of service rendered." This language, however, was omitted from the bill as enacted. The reason therefor appears clearly from the statements of the managers on the floor of the House as follows:
(80 Cong. Rec. 10003.)
"Mr. HEALEY. That is an administrative problem. As I view it, the prevailing wage is already a fact which already exists. The Secretary's duty is simply to inquire and ascertain what that prevailing wage is."
(80 Cong. Rec. 10004.)
"Mr. WALTER. * * * If there is any grave difference of opinion with respect to any portion of this bill it certainly comes with respect to the possibility, if you please, of the Secretary of Labor fixing wages. There is no Member of this House any more opposed to that idea than I am. I say to you frankly that I would not have voted to report such a bill, but there is nothing in this measure that gives to anyone in any executive branch any authority to fix wages. We have had no difficulty in determining what the prevailing rates of wages are under the Bacon-Davis Act. It has been a comparatively simple matter to go into each community in which Government buildings are being constructed, and determine what every particular artisan is paid in that community. The problem is the same here."

[53] Transcontinental & Western Air, Inc., v. Farley, 2 Cir., 71 F. (2d) 288, 290, cert. denied, 293 U. S. 603. See United States ex rel. Goldberg v. Daniels, 231 U. S. 218; Louisiana v. McAdoo, 234 U. S. 627; Morrison, Jr., v. Work, 266 U. S. 481, 485–486; Wells v. Roper, 246 U. S. 335, 337; International Postal Supply Co. v. Bruce, 194 U. S. 601; Belknap v. Schild, 161 U. S. 10. See also Adams v. Nagle, 303 U. S. 532, 540–541, 542; United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 325.

[54] See Scheer v. Moody, D. Mont., 48 F. (2d) 327, 330, rev'd on other grounds, 66 F. (2d) 999.

[55] Bradley v. Fisher, 13 Wall. [U. S.] 335, 351–352. See Cooper v. O'Connor, 99 F. (2d) 135, 137–138, 69 App. D. C. 100, 102–103, cert. denied, 305 U. S. 643. Cf. Johnson v. Lankford, 245 U. S. 541.

[56] Ickes v. Fox, 300 U. S. 82, 97; American School of Magnetic Healing v. McAnnulty, 187 U. S. 94; Waite v. Macy, 246 U. S. 606; Gegiow v. Uhl, 239 U. S. 3 (habeas corpus); Philadelphia Co. v. Stimson, 223 U. S. 605, 620; Goltra v. Weeks, 271 U. S. 536, 545; Adams v. Nagle, 303 U. S. 532, 541–542; Colorado v. Toll, 268 U. S. 228, 230; Lane v.

By reason of their illegality, the acts or threatened acts of such officers are personal and derive no official justification from their being done in asserted agency for the Government.[57]

The jurisdiction of the lower court in the present case depended upon the allegations of the bill of complaint.[58] The bill did not ask the court to interfere with the official discretion of the appellees. It challenged their authority to do the things of which complaint was made.[59] If the allegations of the complaint are true—and we must assume this to be the fact—the action complained of in the present case was not an interpretation of law within the scope of appellees' authority,[60] as in Wells v. Roper,[61] or within the range of their statutory discretion,[62] as in Morrison, Jr. v. Work [63] and Transcontinental & Western Air, Inc. v. Farley;[64] but, instead, it was a palpable evasion of the letter and

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Watts, 234 U. S. 525, 540; Procter & Gamble Co. v. Coe, 96 F. (2d) 518, 521–522, 68 App. D. C. 246, 249–250, cert. denied, 305 U. S. 604:

"The following tests have been used to uphold the exercise of judicial restraint upon executive action under valid laws: (1) Where an officer, insisting that he has the warrant of the statute, is transcending its bounds, and thus unlawfully assuming to exercise the power of government (Philadelphia Co. v. Stimson, supra [223 U. S. 605]); where an officer attempts to enlarge his power, or to usurp power (Waite v. Macy, supra [246 U. S. 606]); or (3) where his act is based upon a clear mistake of law (American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 109, 110, 23 S. Ct. 33, 47 L. Ed. 90); (4) where the action of the officer or administrative body is clearly beyond its power and in violation of the statute (Interstate Commerce Commission v. Northern Pacific Ry. Co., 216 U. S. 538, 30 S. Ct. 417, 54 L. Ed. 608. See Lane v. Watts, 234 U. S. 525, 540, 34 S. Ct. 965, 58 L. Ed. 1440; Santa Fe Pacific R. Co. v. Lane, 244 U. S. 492, 497, 37 S. Ct. 714, 61 L. Ed. 1275); (5) where an officer has acted, or threatens to act, in a capricious and arbitrary manner (Commercial Solvents Corp. v. Mellon, 51 App. D. C. 146, 277 F. 548, 550, and cases there cited); (6) where the act of the officer, 'under any view that could be taken of the facts that were laid before him, was ultra vires, and beyond the scope of his authority' [and] he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do.' Noble v. Union River Logging R. Co., 147 U. S. 165, 171, 172, 13 S. Ct. 271, 273, 37 L. Ed. 123; Board of Liquidation v. McComb, 92 U. S. 531, 541, 23 L. Ed. 623."

[57] Goltra v. Weeks, 271 U. S. 536, 544. See Ryan v. Chicago, B. & Q. R. R., 7 Cir., 7 F. (2d) 137, 144–145; Haskins Bros. & Co. v. Morgenthau, 85 F. (2d) 677, 684, 66 App. D. C. 178, 185, cert. denied, 299 U. S. 588. See also Allen v. Regents, 304 U. S. 439, 444.

[58] Utah Fuel Co. v. National Bituminous Coal Comm., 306 U. S. 56, 60; Johnson v. Lankford, 245 U. S. 541.

[59] Philadelphia Co. v. Stimson, 223 U. S. 605, 620; Ickes v. Fox, 300 U. S. 82, 97; Payne v. Central Pacific Ry., 255 U. S. 228, 236; Franklin Tp. v. Tugwell, 85 F. (2d) 268, 272, 66 App. D. C. 42, 46.

[60] See American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 109–110: "The facts, which are here admitted of record, show that the case is not one where, by any construction of those facts is covered or provided for by the statutes under which the Postmaster General has assumed to act, and his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual. Where the action of such an officer is thus unauthorized he thereby violates the property rights of the person whose letters are withheld."

[61] 246 U. S. 335, 337–338: "But the averments of the bill make it clear that defendant was without personal interest and *was acting solely in his official capacity and within the scope of his duties.* Indeed, it was only because of his official authority that plaintiff's interests were at all endangered by what he proposed to do. * * * And the case does not fall within any of the exceptions to the general rule that the United States may not be sued without its consent, nor its executive agents subjected to the control of the courts respecting the performance of their official duties. It cannot successfully be contended that any question of defendant's official authority is involved; it is a mere question of action alleged to be inconsistent with the stipulation under which it purported to be taken. * * *" [Italics supplied.]

[62] Work v. United States ex rel. Rives, 267 U. S. 175, 177–178; United States ex rel. Goldberg v. Daniels, 231 U. S. 218, 221.

[63] 266 U. S. 481, 486: "The case at bar is unlike those in which relief by injunction has been granted against the head of an executive department, or other officer, of the Government to enjoin an official act on the ground that it was not within the authority conferred, or that it was an improper exercise of such authority, or that Congress lacked the power to confer the authority exercised."

[64] 2 Cir., 71 F. (2d) 288, 291, cert. denied, 293 U. S. 603: "The courts will * * * enjoin acts such as trespass, a *step taken beyond the scope of statutory authority or jurisdiction* of executive officers, but they will not interfere with matters intrusted by Congress to the discretion of the heads of executive departments of the government." [Italics supplied.]

spirit of the pertinent statute. It was an arbitrary attempt "wholly to disregard the statutory mandate"; "to act in the teeth of a [the] statute."[65] In such a case "the suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States."[66]

Appellees contend, also, that their actions are not subject to judicial review and restraint because the protested determination is not an *order* but a mere "finding" which does not command appellants to perform an act or refrain from performing an act; specifically, that no order—based upon such finding—has been issued "directing the Appellants or anyone else to bid upon Government contracts and to agree to pay the prescribed minimum wage." This contention is without merit. No order was required to make the determination effective. By its own terms, it was made binding and effective upon all interested persons and agencies. Thus, it was expressly provided that the "determination shall be effective and the minimum wages hereby established for the respective localities *shall apply to all contracts* awarded subject to Public Act No. 846, 74th Congress, on or after January 31, 1939." [Italics supplied.][67] While the decision thus rendered may not be an "order" in the sense that it does not command or enjoin action,[68] it has legal effect and is final and binding upon all persons desiring to submit bids for government contracts, as well as upon all government agencies. In this respect the determination is similar to many which have been successfully challenged in the courts. Thus, no order was issued in the McAnnulty case,[69] directing the American School of Magnetic Healing, or anyone else, to conduct or refrain from conducting business by mail, and similarly, no order was issued in the case of Waite v. Macy,[70] requiring anyone to import or refrain from importing tea. In Red Canyon Sheep Co. v. Ickes,[71] no order was issued requiring complainant to exercise or refrain from exercising the privilege of grazing sheep upon the public domain. Likewise, in Utah Fuel Co. v. National Bituminous Coal Comm.,[72] the Supreme Court, although dismissing the complaint on the merits, sustained the jurisdiction of the District Court to hear a challenge of the authority of the Coal Commission to direct a disclosure of allegedly confidential

[65] See Adams v. Nagle, 303 U. S. 532, 542, 543.
[66] Philadelphia Co. v. Stimson, 223 U. S. 605, 620; Goltra v. Weeks, 271 U. S. 536, 545. See also, Truax v. Raich, 239 U. S. 33, 37.
[67] The effective date was postponed until March 1, 1939.
[68] Shanahan v. United States, 303 U. S. 596; American Federation of Labor v. National Labor Relations Board, 103 F. (2d) 933, — App. D. C. —; Cf. Rochester Telephone Corp. v. United States, 307 U. S. 125.
[69] American School of Magnetic Healing v. McAnnulty, 187 U. S. 94.
[70] 246 U. S. 606, 608–609: "No doubt it is true that this Court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that the board cannot enlarge the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality, or fitness for consumption. Morrill v. Jones, 106 U. S. 466. United States v. United Verde Copper Co., 196 U. S. 207, 215. United States v. George, 228 U. S. 14, 21. Again, it is true that Courts will not issue injunctions against administrative officers on the mere apprehension that they will not do their duty or will not follow the law. First National Bank of Albuquerque v. Albright, 208 U. S. 548. But in this case the superior of the appellants had promulgated a rule for them to follow which is alleged to be beyond the power of the Secretary to make. It is said that the appellants are independent of the Secretary and that it is to be presumed that they will decide according to law, as they say in their answer. But if the avoidance of a direct statement as to their intent did not of itself warrant a presumption that they would obey orders, the admissions to their counsel were enough to make their intent to do so plain."
[71] 98 F. (2d) 308, 69 App. D. C. 27.
[72] 306 U. S. 56.

information already in its possession. The determinations attacked in these cases—as in the case at bar—were not addressed to the parties complaining but were directed to and purported to govern the activities of administrative officials in carrying out duties created by statute.

Neither is it necessary that special legislative authorization be found in order to permit use of injunction process. As the Supreme Court recently said: "We have held that the determination of the Commission is not an '*order*' reviewable under the Urgent Deficiencies Act of October 22, 1913. Shannahan v. United States, supra [303 U. S. 596]. But we have not held that the determination of the Commission was not subject to judicial review by other procedure, a question which, as we said in the Shannahan case, we had no occasion there to consider. Id., at p. 603. The nature of the determination points to the propriety of judicial review. * * * Equity jurisdiction may be invoked when it is essential to the protection of the rights asserted, even though the complainant seeks to enjoin the bringing of criminal actions." [73]

But appellees contend that appellants have no right which can be protected by injunction; that they are no better off in this respect than would be an ordinary taxpayer.[74] This contention, also, is without merit. In Tennessee Electric Power Co. v. Tennessee Valley Authority,[75] the Supreme Court discussed the doctrine that one threatened with direct injury by the act of an agent of the Government "which, but for statutory authority for its performance, would be a violation of his legal rights, may challenge the validity of the statute in a suit against the agent," and said: "The principle is without application unless the right invaded is a legal right—[1] one of property, [2] one arising out of contract, [3] one protected against tortious invasion, or [4] one founded on a statute which confers a privilege." [Numbers in brackets added.] [76] Certainly the principle should not be less broadly stated in the present case where appellants are not challenging the validity of the statute but are contending, instead, that appellees acted and threaten to act, in violation of the statute, without authority of any kind. In fact, four of the nine cases cited by the Supreme Court, in illumination of the language quoted, were ones in which the acts of the officer were alleged to be without statutory authorization, as in the present case.[77]

It is not denied that appellants have a general legal right to carry on their business free from unlawful restraints,[78] but it is contended

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[73] Shields v. Utah Idaho Central R. R., 305 U. S. 177, 182–183; Utah Fuel Co. v. National Bituminous Coal Comm., 306 U. S. 56, 59–60; American Federation of Labor v. National Labor Relations Board, 103 F. (2d) 933, — App. D. C. —. See Philadelphia Co. v. Stimson, 223 U. S. 605, 621, 622; Truax v. Raich, 239 U. S. 33, 37, 38; Terrace v. Thompson, 263 U. S. 197, 214; Proctor & Gamble Co. v. Coe, 96 F. (2d) 518, 68 App. D. C. 246, cert. denied, 305 U. S. 604, and authorities there cited.

[74] See O'Brien v. Carney, D. Mass., 6 F. Supp. 761, 762.

[75] 306 U. S. 118, 137–138.

[76] This list should be extended to include rights founded on constitutions or treaties which confer privileges. See Asakura v. Seattle, 265 U. S. 332.

[77] American School of Magnetic Healing v. McAnnulty, 187 U. S. 94; Scully v. Bird, 209 U. S. 481, 489; Philadelphia Co. v. Stimson, 223 U. S. 605, 620, 621; Lane v. Watts, 234 U. S. 525, 540.

[78] See International News Service v. The Associated Press, 248 U. S. 215, 236; Id. Canyon Sheep Co. v. Ickes, 98 F. (2d) 308, 317, 69 App. D. C. 27, 36: "* * * the right to carry on a business without illegal interference causing irreparable damage is the subject of equitable protection by injunction." See also, Louis Kamm, Inc., v. Flink, 113 N. J. L. 582, 586–590, 175 A. 62, 66, 67; Godin v. Niebuhr, 236 Mass. 350, 351, 128 N. E. 406, 407.

that no such right is interfered with or molested in the present case—that the determination of the Secretary of Labor is not applicable to appellants' business generally but only to transactions with the Government; that appellants have no legal right to do business with any particular individual; that especially they have no legal right to do business with the Government under any terms or conditions, hence, it is immaterial that an administrative official imposes an unlawful condition. In support of their position, appellees rely upon such cases as B. F. Cummins Co. v. Burleson, 40 App. D. C. 500; O'Brien v. Carney, D. Mass., 6 F. Supp. 761; and Colorado Pav. Co. v. Murphy, 8 Cir., 78 F. 28. These cases are not in point. They hold merely that the lowest bidder is not entitled to an injunction against the letting of a contract to another bidder, or of mandamus to compel an award, since these acts require the exercise of judgment and discretion which cannot be controlled by judicial process. They do not hold that a person has no legal right to deal with the Government in the ordinary course of his business and to bid in competition with others on government contracts; provided, of course, that he observes terms or conditions lawfully imposed.[79] On the contrary, the right to carry on business, generally, necessarily includes the right to negotiate with prospective customers and purchasers free from unlawful restrictions and interference.[80] In this respect it is immaterial whether the prospective customer be a private individual or a government agency. In fact, the right of a person to bid on government contracts is a more valuable right—because of the policy adopted by Congress to encourage free and full competition—than is his right to seek the patronage of private individuals. In the latter case, the prospective customer may decline to carry on business, upon any ground, whether of reason, of whim, caprice, prejudice, or malice.[81] Section 3709, R. S. (41 U. S. C. A. § 5), on the other hand, imposes a duty upon the government departments to advertise publicly for bids and proposals, except when the public exigencies require otherwise, and to award contracts to the lowest responsible bidders.[82]

Cases such as American School of Magnetic Healing v. McAnnulty,[83] Gegiow v. Uhl,[84] Waite v. Macy,[85] and Red Canyon Sheep Co. v. Ickes,[86] present situations analogous to that of the present case. The right of the complainants which was infringed in the McAnnulty case was "the legal right under the general acts of Congress relating to the mails to have their letters delivered at the post office as directed," and to conduct their mail order business. In the Gegiow case it was the

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[79] See 38 Ops. Att'y Gen. (1937) 555, 558: "It is well established that the invitation for bids on a Government contract must be such as to permit full and free competition. * * *"

[80] See Godin v. Niebuhr, 236 Mass. 350, 128 N. E. 406; 2 COOLEY, TORTS (4th ed. 1932) § 220. Cf. Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 252.

[81] Great A. & P. Co. v. Cream of Wheat Co., 2 Cir., 227 F. 46. Compare the situation when one of the parties has a monopoly. Eastman Kodak Co. v. Southern Photo Materials Co., 273 U. S. 359.

[82] 38 Ops. ATT'Y GEN. (1937) 555, 557.

[83] 187 U. S. 94.

[84] 239 U. S. 3.

[85] 246 U. S. 606.

[86] 98 F. (2d) 308, 69 App. D. C. 27.

right to enter and remain in the United States subject to the conditions imposed by Congress. In the Waite case it was the right to import tea subject only to the conditions imposed and permitted to be imposed by the statute. In the Red Canyon Sheep Co. case it was the privilege of carrying on the business of sheep raising upon the public domain, subject only to similar statutory conditions and limitations. In the present case it is the right to bid for government contracts and, if awards are made, to perform such contracts under the general acts of Congress relating to such matters, in each case subject only to limitations and conditions imposed or permitted to be imposed by Congress.

A person need not conduct business by mail, or import tea, or graze sheep, or migrate to the United States, unless he wishes to do so, but it is his right to do so, and if he does he can be subjected to any lawful limitation imposed by Congress. Similarly, a citizen need not bid for government contracts but it is his right to do so, and if he does he, too, can be subjected, similarly, to any lawful limitation imposed by Congress.[87] But when any person, private or official, attempts to interfere with these rights by unlawful limitations not imposed or allowed to be imposed by Congress, then relief may be obtained upon a proper showing. A statute, by prescribing the conditions and limitations which properly may be imposed upon one who seeks to enjoy a right, prohibits the denial of the right upon other grounds.[88] In the present case, appellees admit that appellants have a right to bid on government contracts. They argue that appellants may bid on any terms they choose, and without including the minimum wage stipulation required by the protested determination. But bidding in the manner suggested would be a useless gesture, foredoomed to failure, because of the imposition of the unlawful requirements; hence, the imposition of such requirements in tantamount to a denial of the right to bid in the first instance.

In the present case, as in the ones last cited, the complainants "had violated no law which Congress had passed;"[89] nevertheless, in each case their rights have been interrupted and blockaded by "the absolutely uncontrolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual."[90]

Appellees contend that appellants have failed to allege facts which show that any injury is sufficiently impending and threatening to justify the exercise of equity jurisdiction. It appears from the complaint that appellants are engaged in the production and sale of products of the iron and steel industry, within the area of fourteen states and the District of Columbia determined by appellees to constitute a locality; that they employ common laborers at wages ranging from 52½ to 56½

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[87] Ellis v. United States, 206 U. S. 246; Stephenson v. Binford, 287 U. S. 251, 275-276; Atkin v. Kansas, 191 U. S. 207, 222-223; Heim v. McCall, 239 U. S. 175, 191.

[88] Geglow v. Ubl, 239 U. S. 3, 9.

[89] American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 110.

[90] Ibid. The principle enunciated in the McAnnulty case has been approved on numerous occasions by the Supreme and Federal courts. Morrison, Jr. v. Work, 266 U. S. 481; Transcontinental & Western Air, Inc. v. Farley, 2 Cir., 71 F. (2d) 288, 291, cert. denied, 293 U. S. 603; United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 325; Goltra v. Weeks, 271 U. S. 536, 545; Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U. S. 118, 137–138.

cents per hour, which in each case, respectively—at Coatesville, Pennsylvania, at Montgomery County, Pennsylvania, at South Chester, Pennsylvania, at Harrisburg, Pennsylvania, at Colgate, Maryland, and at Branford, Connecticut—constitutes the minimum base rate of pay for common labor in the iron and steel industry, although wages paid to common laborers in other employments in such localities are much lower; that four of the seven appellants are parties to agreements with groups of organzied labor, which provide for the payment of the common labor base rates specified; that five of the seven appellants have sold iron and steel products to various agencies of the United States for many years, particularly to the Departments of War, Navy, and Interior; that the principal products sold have consisted of steel plates, sheets, pipe, slabs, high pressure gas cylinders, steel flanges, and aerial bombs; that approximate amounts of gross sales by certain of the appellants to agencies of the United States during 1937 were, respectively: Lukens, $107,750, Alan Wood, $134,000, Harrisburg, $184,807, Eastern, $27,000; and during 1938: Lukens, $277,749, Alan Wood, $185,400; Harrisburg, $71,436; Eastern, $3,350; that only during short periods in more than 20 years has Central been without a government contract in progress; that "Lukens presently is a party to four contracts made with the Department of the Navy, the performance of which has not been completed. The sales price of the iron and steel products to be furnished under such contracts is approximately $100,000"; that Alan Wood has unfilled orders from the War and Navy Departments for iron and steel products, the price of which aggregates approximately $200,000; that the tonnage of products furnished by Central to agencies of the United States during the last ten years has averaged approximately 8% of its total product; that each of the appellants desires to continue to bid on such contracts and carry on similar business with agencies of the United States in the future. The complaint then sets out the various capacities in which Appellees Morgenthau, Peoples, Swanson, Woodring, Ickes, and Farley act in the making of contracts for such products as are manufactured by appellants; it sets out sections of the Public Contracts Act previously referred to; it recites the procedure followed by Appellees Perkins and McLaughlin in arriving at the protested determination, together with portions of that determination. It further sets out that Appellees Perkins and McLaughlin are threatening to make the determination effective; that the determination is "void and wholly beyond the authority" of said appellees; that they "acted arbitrarily and capriciously and wholly without warrant or authority in law"; that the protested determination constitutes an attempt by said appellees "purporting to act in their respective official capacities above set forth and under the guise and pretense of determining the minimum wages actually prevailing in the respective localities in which the plants of plaintiffs and other manufacturers of products of the Iron and Steel Industry are located, but, in fact, acting completely beyond any authority conferred upon them by law, to raise and fix

the wage rates to be paid at such plants." It further appears from the complaint that Appellees Perkins, McLaughlin, and Walling "have been and are threatening to require that there be included in every contract made and entered into after March 1, 1939, by any agency of the United States, for the manufacture or furnishing of products of the Iron and Steel Industry (as that Industry is defined in the Determination), in any amount exceeding $10,000, a stipulation or representation that any person employed by the contractor in the manufacture or furnishing of any of such products used in the performance of the contract will be paid, without subsequent deductions or repayment on any account not less than the minimum wages set forth in the Determination, or a stipulation or representation of like purport and effect; * * *." It appears further that Appellee Peoples, "acting pursuant to the direction and instruction of the defendants Perkins, McLaughlin, and Walling, and purporting to act as Director of Procurement, has directed and threatens to continue to direct every agency of the United States desiring to enter into any such contract after March 1, 1939, to include such a stipulation in such contract and the invitations to bid therefor." It appears further that a regulation issued by Appellee Perkins requires the insertion of the said stipulation in contracts for the manufacture of such materials; that invitations to bid on such contracts, issued by Appellee Swanson, contain a statement that such determination and the wages therein established shall be effective; that Appellees Morgenthau, Swanson, Woodring, Ickes, and Farley intend to and will, unless restrained, require the insertion of a similar stipulation in all contracts awarded under their direction; that large appropriations have been made by Congress for purchase of such materials; that large and important contracts are soon to be let; that appellants desire to bid on such contracts and that unless appellees are enjoined and restrained, appellants will suffer immediate and irreparable injury for which they have no adequate remedy at law for the following reasons, among others:

(i) The plaintiffs will be deprived of their lawful right to bid on contracts for the manufacture or furnishing to any agency of the United States, including the executive departments of which the heads thereof are defendants named herein, of any of the products of the Iron and Steel Industry (as defined in the Determination), free of limitations other than those imposed by Congress, and will be precluded from selling to any such agency any of such products, unless the plaintiffs shall agree, in each contract for the sale to any such agency of any such products in an amount in excess of $10,000, to pay the persons employed in the performance of such contract at the rate of wages specified in the Determination. The plaintiffs will be deprived of such right, and will be required so to agree, not by any statute of the United States or by any action lawfully taken thereunder by any officer or agent of the United States, but by reason of arbitrary and capricious acts of the defendants in excess of and without warrant of, but under color of authority conferred upon them by law.

(ii) As heretofore shown herein, the bids on substantial contracts to be awarded by or under the authority of the defendant Swanson, on which contracts or parts thereof certain plaintiffs heretofore named desire to submit bids, are to be opened on or shortly after March 1, 1939. As also heretofore shown herein, numerous other valuable and important contracts will be let by or under the authority of defendants named herein within a relatively short time after March 1, 1939. If the plaintiffs should submit bids upon any such contract, and enter into any such contracts, which include stipulations or representations in terms or to the effect that the plaintiffs will pay to persons employed by the plaintiffs in the performance of such contracts the minimum wages set forth in the Determination, the plaintiffs would be in danger of being estopped, and counsel for the plaintiffs have advised the plaintiffs that a court might hold that they were estopped, to secure a judicial determination of the invalidity of the Determination. Moreover, the penalties provided in Sections 2 and 3 of the Act for noncompliance with any such stipulation or representation would impose upon the plaintiffs the burden of obtaining a judicial decision of the question of the validity of the Determination only upon the condition that, if unsuccessful, the plaintiffs must pay excessive penalties, have their contracts subject to cancellation, and be precluded from obtaining the award of any public contract for three years, unless the Secretary of Labor otherwise recommends. Such penalties are so severe as in effect to close all approaches to the courts and deprive the plaintiffs of any adequate remedy at law in the premises.

(iii) As has heretofore been shown, the rates of pay for wage earners employed by the plaintiffs at other than common labor base rates of the respective plaintiffs for common labor are generally ascertained by adding various differentials to such common labor base rates, respectively, and an increase in such common labor base rates will, as a practical matter, necessarily result in an increase in the rates of pay for such other persons. Furthermore, it will be impracticable, in the case of any of the plaintiffs who enter into contracts with an agency of the United States requiring an increase in the base rate of pay for persons employed in a particular plant by such plaintiff in the performance of such contract, to fail correspondingly to increase the base rate of pay for other wage earners employed by such plaintiff on other w ers in such plant.

(iv) If the plaintiffs are required to pay the minimum wages fixed in the Determination, there is grave danger that they will no longer be able successfully to compete for Government contracts since large, fully integrated companies enjoying more favorable geographic locations from the standpoint of proximity to sources of supply for the raw materials used by them, proximity to the markets for their products and freight rate differentials should be able to underbid plaintiffs, if the plaintiffs must pay the same minimum wages as such competitors are now paying. On the other hand, if plaintiffs do not agree to pay such minimum wages, they will be in grave danger of losing a substantial source of revenue.

These allegations sufficiently present every requisite to the exercise of equity jurisdiction for the protection of the rights which appellants assert.[91] Moreover, the threat of injury in this case is made greater by the provisions of the Act which penalize failure to conform to orders and determinations made thereunder.[92]

Appellees contend that the complaint should be dismissed because appellants have not exhausted their administrative remedy.[93] But no administrative remedy is provided by the Act to meet the grievances alleged in the complaint, and no administrative remedy is otherwise available. The Act does not contemplate unlawful conduct beyond its terms and entirely outside the scope of its authority. Section 6, which appellees contend establishes an administrative remedy, provides for application to the Secretary of Labor for exception from the operation of the Act, but only (1) at the instance of the "head of the contracting agency or department" upon a written finding that adherence to the Act would seriously impair government business, or (2) upon joint recommendation of the contracting agency and the contractor after a contract has been made. The section further provides that the Secretary may make rules and regulations allowing exemptions from the Act, but we have been referred to no such action by the Secretary. Section 6 assumes a proper determination within the scope of the Act and pursuant to the authority thereof. The procedure therein provided could not possibly be used to challenge the authority of appellees to act as they have done. Moreover, even if that procedure were available to appellants, its use would admit the legality of the protested determination and leave them at the mercy of appellees in carrying out their unlawful purposes.

Appellants request also a judgment under the appropriate statute declaratory of their rights in the premises. A determination of the propriety of that request involves consideration of questions of law which have heretofore been discussed.[95] However, a declaratory

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[91] See Shields v. Utah Idaho Central R. R., 305 U. S. 177, 183; Utah Fuel Co. v. National Bituminous Coal Comm., 306 U. S. 56.

[92] Section 2 of the statute provides that any breach of this stipulation shall render the contracting party liable to the United States for liquidated damages, including a sum equal to the amount of any deductions, rebates, refunds or underpayment of wages due to any employee engaged in the performance of the contract, and, in addition, shall render the contract subject to cancellation. Section 3 directs the Comptroller General to distribute a list to all government agencies containing the names of persons found to have breached any such representations or stipulations and, unless otherwise recommended by the Secretary of Labor, such persons may not be awarded a government contract for a period of three years. 49 Stat. 2037, 41 U. S. C. A. §§ 36, 37 (Supp. 1938). See Ex parte Young, 209 U. S. 123, 145 et seq.; Philadelphia Co. v. Stimson, 223 U. S. 605, 622; National Remedy Co. v. Hyde, 50 F. (2d) 1066, 1068, 60 App. D. C. 252, 254; Terrace v. Thompson, 263 U. S. 197, 215–216; Petroleum Exploration, Inc. v. Public Service Comm., 304 U. S. 209, 218–220.

[93] Myers v. Bethlehem Shipbuilding Corp., 303 U. S. 41, 50–51; Red River Broadcasting Co., Inc. v. Federal Communications Comm., 98 F. (2d) 282, 284, 69 App. D. C. 1, 3, cert. denied, 305 U. S. 625: "However, it is a well-settled rule of judicial administration that no one is entitled to judicial relief until he has exhausted all prescribed, applicable, administrative remedies. [Italics supplied.] Cf. Mallory Coal Co. v. National Bituminous Coal Comm., 99 F. (2d) 399, 407, 69 App. D. C. 166, 174.

[94] Declaratory Judgment Act, Jud. Code § 274d, 28 U. S. C. A. § 400 (Supp. 1938).

[95] Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 239–241; Ashwander v. Tennessee Valley Authority, 297 U. S. 288, 325; United States v. West Virginia, 295 U. S. 463, 475; Putnam v. Ickes, 78 F. (2d) 223, 226, 64 App. D. C. 339, 342, cert. denied, 296 U. S. 632: "We think it is clear, from any reasonable construction of the acts that the Declaratory Judgment Act has not given the courts jurisdiction over any controversy that would not be within their jurisdiction if affirmative relief were being sought."

judgment may be given even though there be insufficient allegations of threatened irreparable injury to support a prayer for relief by injunction.[96] As the complaint in the present case is sufficient in that respect, as well as in others, it follows that appellants would be entitled to declaratory relief in any event.[97]

The case is therefore remanded to the District Court, which is instructed to set aside and vacate its judgment dismissing the complaint, and is directed to proceed in accordance with the opinion of this court.

Reversed.

EDGERTON, J., dissenting. The first section of the Act of June 30, 1936, sometimes called the Public Contracts Act, requires "in any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States * * *, for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount, exceeding $10,000," a stipulation "that all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid * * * not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract." With respect to minimum wages in the iron and steel industry, the Secretary of Labor has divided the United States into six "localities." One "locality" comprises Ohio, Pennsylvania, Delaware, Maryland, Kentucky, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, and Maine, part of West Virginia, and the District of Columbia. The Secretary has determined the prevailing minimum wage in iron and steel, in that locality, to be 62½ cents per hour. This minimum prevails in the Pittsburgh and Youngstown districts, where the great bulk of the steel production in the entire area is concentrated; but there are many plants east of the Pittsburgh district, and very few of these pay as much as 62½ cents for common labor. Appellants, who have sold iron and steel products to the government in the past, operate plants in eastern Pennsylvania, Maryland, and Connecticut, and pay minimum wages which vary from 52½ to 56½ cents per hour. Appellants, contending that 14 States are not a "locality" and also that they were not accorded the hearing contemplated by the Act, filed in the court below a bill to compel the Secretary of Labor to withdraw the determination; to enjoin the Director of the Procurement Division of the Treasury Department,

[96] Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 241: "And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required"; Nashville, Chattanooga & St. Louis Ry. v. Wallace, 288 U. S. 249, 264.

[97] Stephenson v. Equitable Life Assur. Soc., 4 Cir., 92 F. (2d) 406; Wallace v. Currin, Cir., 95 F. (2d) 856, 861, aff'd, 306 U. S. 1.

and the Secretaries of War, the Navy, the Treasury, the Interior, and the Postmaster General, individually and in their respective official capacities, from giving effect to the determination in the bidding upon and award of public contracts; and for a declaratory judgment that the determination is invalid.

Appellees point out that dictionaries recognize a broad sense of "locality"; that a narrow construction of the word, as applied to steel, would defeat the purpose of the act by enabling low-wage concerns to compete for government contracts with high-wage concerns in the same competitive area; and that it would also make the act nearly meaningless as applied to steel, because in a given neighborhood there is frequently only one steel concern, which necessarily pays the wages which prevail in its own plant. This definition is from the Century Dictionary: "locality * * *. Any part of space; a situation; position; particularly, a geographical place or situation; as, a healthy locality; the locality of a mineral, plant, or animal." I think the Secretary's construction of the word is a tenable one in the present context. The cases make it doubtful whether we need consider that question, and they make it clear that if the construction is tenable we should not disturb it. United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 316, 324, 23 S. Ct. 698, 47 L. Ed. 1074; State of Louisiana v. McAdoo, Secretary of the Treasury, 234 U. S. 627, 633, 34 S. Ct. 938, 58 L. Ed. 1506; Adams, Receiver, v. Nagle et al., 303 U. S. 532, 542, 543, 58 S. Ct. 687, 82 L. Ed. 999.

I think that, even if the Secretary's construction of "locality" is not tenable, appellants' bill was properly dismissed, for several reasons.

(1) I think the suit is in substance against the United States, and therefore not maintainable without its consent. Suits which "would operate to disturb the whole revenue system of the Government" are in effect suits against the United States. Louisiana v. McAdoo, 234 U. S. 627, 632, 34 S. Ct. 938, 58 L. Ed. 1506.[*] So are suits which, like this one, would operate to disturb the whole contracting system of the government. It is settled that a suit to require conformity to law in the performance or cancellation of public contracts is a suit against the United States. Wells v. Roper, 246 U. S. 335, 38 S. Ct. 317, 62 L. Ed. 755; Transcontinental & Western Air, Inc., v. Farley, 71 F. (2d) 288 (C. C. A. 2d), cert. den. 293 U. S. 603; United States ex rel. Shoshone Irrigation Dist. v. Ickes, 63 App. D. C. 167, 70 F. (2d) 771, cert. den. 293 U. S. 571; Boeing Air Transport, Inc., v. Farley, 64 App. D. C. 162, 75 F. (2d) 76, cert. den. 294 U. S. 728. No reason appears for distinguishing in this respect a suit, like the present one, to require conformity to law

[*] So of a suit "to interfere with its management and disposition of the lands or the funds" which the United States holds in trust. Morrison v. Work, 266 U. S. 481, 483, 45 S. Ct. 149, 69 L. Ed. 394. So of a suit to restrain the use in a post office of letter machines which infringe plaintiff's patent. International Postal Supply Co. v. Bruce, 194 U. S. 601, 24 S. Ct. 820, 48 L. Ed. 1134. So of a suit to set aside an order of the Interstate Commerce Commission refusing an increase of railway mail pay. United States v. Griffin, 303 U. S. 226, 238, 58 S. Ct. 601, 82 L. Ed. 764.

the process of entering into public contracts. Johnstown Coal & Coke Co., Inc., v. Wilson, 60 F. (2d) 557.

The heads of six executive departments of the government are here sued in their official capacities. "That the United States is not named on the record as a party is true. But the question whether it is in legal effect a party to the controversy is not always determined by the fact that it is not named as a party on the record, but by the effect of the judgment or decree which can here be rendered." [99] A judgment or decree in favor of the appellants will control the terms on which the United States may enter into contracts for the necessary work of the Departments of Labor, War, Navy, the Treasury, the Interior, and the Post Office. It will thereby regulate the conduct by the United States of vast activities of unquestioned constitutionality and legality. Although it will not prevent those contracts from being made and those activities from being carried on, it will prevent them from being made and carried on on certain terms. It will have a far larger effect upon the United States than the decree which was sought and refused in Wells v. Roper, supra, for that decree would have controlled only a single contract.

The appellants contend that the particular action which the Secretary of Labor has taken and the other appellees propose to take is unlawful. But it is not contended that the Secretary of Labor has no authority to make minimum wage determinations with respect to public contracts for iron and steel, or that the other appellees have no authority to make public contracts for iron and steel. The appellants, then, ask the court to regulate the discharge by the appropriate government officers of their lawful and vital function of supplying the needs of the government. This is not a case in which, if the appellants are right as to the law, the United States has no occasion to act in the premises; there is occasion, on any view of the law, for the United States to act and for these appellees to act in its behalf. The appellants' complaint is merely that appellees act illegally instead of legally. The fact that they may be acting illegally does not make the suit any the less a suit against the United States. On the contrary, if they were acting legally they could, of course, successfully defend their action on that ground, and the immunity of the United States from suit would be comparatively unimportant. It is only when, as here, the government's representatives may be acting illegally that the rule which forbids a suit against the United States has any great significance. In most of the suits which have been decided to be suits against the United States, and therefore not maintainable without its consent, the courts have either assumed that the defendant officers were acting illegally or have refused to consider the alleged illegality of their action.[1] Where, as in Wells v. Roper, the defend-

[99] Louisiana v. McAdoo, 234 U. S. 627, 629, 34 S. Ct. 938, 58 L. Ed. 1506.

[1] E. g., International Postal Supply Co. v. Bruce, 194 U. S. 601, 24 S. Ct. 820, 48 L. Ed. 1134; Louisiana v. McAdoo, 234 U. S. 627, 34 S. Ct. 938, 58 L. Ed. 1506; Wells v. Roper, 246 U. S. 335, 38 S. Ct. 317, 62 L. Ed. 755; United States v. Griffin, 303 U. S. 226, 58 S. Ct. 601, 82 L. Ed. 764

ants have declined to deal contractually with the plaintiff on behalf of the United States, the immunity of the United States has barred the suit, however lawless the action of the defendants may have been. In Wells v. Roper the plaintiff had a contract with the United States; here, the plaintiffs hope to make contracts with the United States. The difference does not strengthen their position.

One who seeks public employment is in a different position from one who seeks private employment. In Truax v. Raich, 239 U. S. 33, 36 S. Ct. 7, 60 L. Ed. 131, the Supreme Court held that a state statute forbidding employment of foreigners in private industry was unconstitutional; but four weeks later, in Heim v. McCall, 239 U. S. 175, 36 S. Ct. 78, 60 L. Ed. 206, it held that a state statute forbidding employment of foreigners on public works was valid. The ground was that the state could freely determine whom it would employ. The privilege of seeking employment by the sovereign is not, like the privilege of seeking private employment, a constitutional right. Private employment, if obtained, results in claims which are constitutionally entitled to enforcement; but employment by the United States, if obtained, results in no enforcible claims unless the United States chooses to allow them. It is anomalous to enforce against the sovereign, without its consent, a privilege of seeking to acquire claims against it which would themselves be unenforcible without its consent. I know of no case in which it has been held that the courts may, without congressional authorization, inquire whether officers of the United States are exceeding their authority, when the only threatened damage consists in the loss of an opportunity to make money by dealing with the United States.

There are, of course, many cases in which, without the sovereign's consent, the action of the sovereign's officers in its behalf has been held controllable by the courts, in apparent derogation of the sovereign's immunity. But in those cases judicial control of the defendant officers was necessary to the protection of the plaintiff's constitutional rights or, at least, of "rights" of a well-established character, i. e., interests to the protection of which, apart from the sovereign's immunity, the plaintiff was clearly entitled. Examples are United States v. Lee,[2] a suit to recover the plaintiff's land, unlawfully withheld by government officers; Ex parte Young,[3] which restrained state officers from enforcing confiscatory railroad rates; Waite v. Macy,[4] which protected plaintiff's right to import harmless and unforbidden tea; and American School of Magnetic Healing v. McAnnulty,[5] which protected plaintiff's right to use the mails.

(2) Statutes in regard to the making of government contracts are intended for the benefit of the government, not of contractors or bidders. American Smelting & Refining Co. v. United States, 259 U. S.

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[2] 106 U. S. 196, 1 S. Ct. 240, 27 L. Ed. 171.
[3] 209 U. S. 123, 28 S. Ct. 441, 52 L. Ed. 714.
[4] 246 U. S. 606, 38 S. Ct. 395, 62 L. Ed. 892.
[5] 187 U. S. 94, 23 S. Ct. 33, 47 L. Ed. 90.

75, 78, 42 S. Ct. 420, 66 L. Ed. 833. It follows that even an actual bidder, to say nothing of a prospective bidder, cannot complain of the failure of public officers to comply with statutes in regard to the making of contracts. Colorado Paving Co. v. Murphy, 78 Fed. 28 (C. C. A. 8th; opinion by Judge Sanborn), appeal dismissed, 166 U. S. 719; Molloy v. City of New Rochelle, 198 N. Y. 402, 92 N. E. 94; Talbot Paving Co. v. City of Detroit, 109 Mich. 657, 67 N. W. 979; O'Brien v. Carney, 6 F. Supp. 761.[6] In this aspect the case is much as if a private corporation's agent should propose to insert in contracts a term inconsistent with his principal's instructions, and third persons wishing to contract with the principal on the principal's terms should thereupon ask a court to compel the agent to conform to them. The principal is the only person who can require the agent to carry out his instructions.

(3) If one of appellants were to be the sole bidder for any particular contract, the wage determination could do it no substantial harm; it would have only to pay the increased wage, and increase its bid proportionately. That, of course, is not the case. Appellants are subject to competition; and they anticipate that, if the alleged illegal determination is enforced, they will be injured by the competition of other concerns better able to pay the required wage. As they express it, "If the plaintiffs are required to pay the minimum wages fixed in the Determination, there is grave danger that they will no longer be able successfully to compete for Government contracts since large, fully integrated companies enjoying more favorable geographic locations from the standpoint of proximity to sources of supply for the raw materials used by them, proximity to the markets for their products and freight rate differentials should be able to underbid plaintiffs, if the plaintiffs must pay the same minimum wages as such competitors are now paying." But there is no contention that it is illegal to pay, or to promise to pay, 62½ cents per hour. Accordingly, the competition from which appellants anticipate injury will be lawful. And it is settled that one cannot complain of or prevent damage by lawful competition, even though the competition or its damaging character may be due to the action by officers of the United States which is attacked as lawless. Alabama Power Co. v. Ickes, 302 U. S. 464, 58 S. Ct. 300, 82 L. Ed. 374; Tennessee Electric Power Co. v. Tennessee Valley Authority, 306 U. S. 118; Louisiana v. McAdoo, 234 U. S. 627, 631, 34 S. Ct. 938, 58 L. Ed. 1506.

(4) While it is contended that one of appellants has lost one contract, the injury which appellants in general anticipate is too contingent to qualify as irreparable injury and support an injunction. They may not bid, may not be the lowest bidders if they do, may not be awarded a contract if they are the lowest bidders, and may not

[6] There are cases in some states to the contrary; e. g., Boren & Guckes v. Commissioners of Darke County, 21 Ohio St. 311; St. Landry Lumber Co., Ltd., v. Mayor of Bunkie, 155 La. 892, 99 So. 687.

profit from a contract if they get one. Ames & Company v. Wallace, 1 Su. Ct. D. C. (N. S.) 238.[1]

I think the decree of the District Court dismissing the bill should be affirmed.

Tuesday, October 3rd, A. D. 1939

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No. 7368. October Term, 1939

LUKENS STEEL COMPANY, A CORPORATION, ALAN WOOD STEEL COMPANY, A CORPORATION, SOUTH CHESTER TUBE COMPANY, A CORPORATION, APPELLANTS,

vs.

FRANCES PERKINS, INDIVIDUALLY AND AS SECRETARY OF LABOR OF THE UNITED STATES, CHARLES V. MCLAUGHLIN, INDIVIDUALLY AND AS ASSISTANT SECRETARY OF LABOR OF THE UNITED STATES, L. METCALFE WALLING, INDIVIDUALLY AND AS ADMINISTRATOR OF THE DIVISION OF PUBLIC CONTRACTS OF THE DEPARTMENT OF LABOR OF THE UNITED STATES, ET AL.

Appeal from the District Court of the United States for the District of Columbia

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed, and that this case be, and it is hereby, remanded to the said District Court with instructions to set aside and vacate its judgment dismissing the complaint, and that said District Court be, and it is hereby, directed to proceed in accordance with the opinion of this Court; costs in this Court to be borne by appellants.

Per MR. JUSTICE MILLER.

OCTOBER 3, 1939.

Dissenting opinion by MR. JUSTICE EDGERTON.

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[1] Affirmed and appeal dismissed, 81 F. (2d) 414.
The lack of irreparable injury is not in itself an answer to plaintiffs' demand for a declaratory judgment. Nashville, C. & St. L. Ry. v. Wallace, 288 U. S. 249, 264, 53 S. Ct. 345, 77 L. Ed. 730.

United States Court of Appeals for the District of Columbia

No. 7368

No. 3056 Original

LUKENS STEEL COMPANY, A CORPORATION, ALAN WOOD STEEL COMPANY, A CORPORATION, SOUTH CHESTER TUBE COMPANY, A CORPORATION, ET AL., APPELLANTS,

vs.

FRANCES PERKINS, INDIVIDUALLY AND AS SECRETARY OF LABOR OF THE UNITED STATES, CHARLES V. MCLAUGHEIN, INDIVIDUALLY AND AS ASSISTANT SECRETARY OF LABOR OF THE UNITED STATES, L. METCALFE WALLING, INDIVIDUALLY AND AS ADMINISTRATOR OF THE DIVISION OF PUBLIC CONTRACTS OF THE DEPARTMENT OF LABOR OF THE UNITED STATES, ET AL., APPELLEES

United States Court of Appeals for the District of Columbia. Filed Oct. 31, 1939. Joseph W. Stewart, Clerk.

Motion to substitute party

Now come appellants and, upon the stipulation annexed hereto as Exhibit A and made a part hereof, respectfully move this Honorable Court to substitute Charles Edison, individually and as Acting Secretary of the Navy of the United States, as a (defendant-) appellee in this cause, in lieu and in place of, and as successor to, Claude Augustus Swanson, deceased, originally joined herein as a (defendant-) appellee, individually and as Secretary of the Navy of the United States, with the same force and effect as if said Charles Edison had been originally named herein as a (defendant-) appellee and as if all statements, references, and provisions in all pleadings, motions, orders, judgments, mandates, and other papers in this cause with respect to, or applicable to, said Claude Augustus Swanson, individually and as Secretary of the Navy of the United States, had originally been made with respect to, or applicable to, said Charles Edison, individually and as Acting Secretary of the Navy.

Dated October 28, 1939.

(Signed) O. MAX GARDNER,
O. Max Gardner,
ROBERTS B. THOMAS,
FREDERICK H. KNIGHT,
Counsel for appellants.

The undersigned consents to the granting of the above motion.

(Signed) TELFORD TAYLOR,
Counsel for appellees and for Charles Edison, Acting Secretary of the Navy of the United States.

Exhibit A

United States Court of Appeals for the District of Columbia

No. 7368

No. 3056 Original

LUKENS STEEL COMPANY, A CORPORATION, ALAN WOOD STEEL COMPANY, A CORPORATION, SOUTH CHESTER TUBE COMPANY, A CORPORATION, ET AL., APPELLANTS

v.

FRANCES PERKINS, INDIVIDUALLY AND AS SECRETARY OF LABOR OF THE UNITED STATES, CHARLES V. MCLAUGHLIN, INDIVIDUALLY AND AS ASSISTANT SECRETARY OF LABOR OF THE UNITED STATES, L. METCALFE WALLING, INDIVIDUALLY AND AS ADMINISTRATOR OF THE DIVISION OF PUBLIC CONTRACTS OF THE DEPARTMENT OF LABOR OF THE UNITED STATES, ET AL., APPELLEES

Stipulation

It is hereby stipulated and agreed by and between counsel for Charles Edison, Acting Secretary of the Navy of the United States, counsel for the appellees in this cause, and counsel for the appellants in this cause:

(1) that Claude Augustus Swanson, originally joined in this cause as a (defendant-) appellee, individually and as Secretary of the Navy of the United States, died on July 7, 1939;

(2) that said Charles Edison is, and since the date of the death of said Claude Augustus Swanson on July 7, 1939, has been, Acting Secretary of the Navy of the United States; does have, and has had, his official residence as such Acting Secretary, and does reside, and has resided, in the District of Columbia; and is, and has been, found in said District;

(3) that said Charles Edison, as Acting Secretary of the Navy, has adopted and continued, adopts and continues, and intends to continue, all action with respect to the subject matter of this cause taken or intended to be taken by said Claude Augustus Swanson, as Secretary of the Navy of the United States; and

(4) that, subject to the approval of this Court, said Charles Edison, individually and as Acting Secretary of the Navy of the United States, may be substituted as a (defendant-) appellee in this cause in lieu and in place of, and as successor to, said Claude Augustus Swanson, deceased, originally joined herein as a (defendant-) appellee with the same force and effect as if said Charles Edison had been originally named herein as a (defendant-) appellee and as if all statements, references, and provisions in all pleadings, motions, orders

judgments, mandates, and other papers in this cause with respect to, or applicable to, said Claude Augustus Swanson, individually and as Secretary of the Navy of the United States, had originally been made with respect to, or applicable to, said Charles Edison, individually and as Acting Secretary of the Navy.

Dated October 28, 1939.

(Signed) TELFORD TAYLOR,
Counsel for appellees and for Charles Edison,
Acting Secretary of the Navy of the United States.
(Signed) O. MAX GARDNER,
(Signed) ROBERTS B. THOMAS,
(Signed) FREDERICK H. KNIGHT,
Counsel for appellants.

Wednesday, November 8th, A. D. 1939

* * * * * * *

Before Honorable D. LAWRENCE GRONER, Chief Justice, in Chambers

* * * * * * *

Nos. 3056 Original; 7368

LUKENS STEEL COMPANY &C ET AL., APPELLANTS

vs.

FRANCES PERKINS, INDIVIDUALLY AND AS SECRETARY OF LABOR &C. ET AL.

On consideration of the motion to substitute Charles Edison, Individually and as Acting Secretary of the Navy of the United States, as a party appellee herein in the place and stead of Claude Augustus Swanson, deceased. It is ordered by the Court that the motion be, and it is hereby, granted.

* * * * * * *

In the United States Court of Appeals for the District of Columbia

No. 7368

LUKENS STEEL COMPANY, ET AL., APPELLANTS

vs.

FRANCES PERKINS, INDIVIDUALLY AND AS SECRETARY OF LABOR OF THE UNITED STATES, ET AL

United States Court of Appeals for the District of Columbia. Filed Nov. 14, 1939. Joseph W. Stewart, Clerk.

Designation of record

The clerk in the preparation of the transcript of record on petition for certiorari to the Supreme Court of the United States will include the following:

1. Printed record.

2. No. 3056 Original—Petition for temporary injunction pending final hearing and determination of cause on appeal (including the index to the attached exhibits, but not the exhibits).

3. No. 3056 Original—Objections to petition for temporary injunction (not including attached exhibits).

4. Affidavits of John W. Logan and George W. Whitney, filed March 22, 1939.

5. No. 3056 Original—Minute entry of argument on petition for temporary injunction.

6. No. 3056 Original—Order granting petition for temporary injunction.

7. No. 3056 Original—Motion for reargument on petition for temporary injunction or for a more specific injunction and security.

8. No. 3056 Original—Objections to motion for reargument on petition for temporary injunction.

9. Minute entry of argument on appeal.

10. No. 3056 Original—Motion to dissolve temporary injunction pending appeal.

11. Order and per curiam opinion of the Court, dated August 4, 1939.

12. Opinions of the Court, dated October 3, 1939.

13. Judgment or decree.

14. Motion, stipulation, and order substituting Charles Edison, Acting Secretary of the Navy, as defendant-appellee, vice Claude Augustus Swanson, deceased.

15. This designation.

16. Clerk's certificate.

ROBERT H. JACKSON,
Solicitor General.

Service of designation of record is acknowledged this 13th day of November, 1939.

O. MAX GARDNER.
ROBERTS B. THOMAS.
FREDERICK H. KNIGHT.

United States Court of Appeals for the District of Columbia

No. 7368

LUKENS STEEL COMPANY ET AL., APPELLANTS

v.

FRANCES PERKINS, INDIVIDUALLY AND AS SECRETARY OF LABOR OF THE UNITED STATES, ET AL., APPELLEES

United States Court of Appeals for the District of Columbia. Filed Nov. 15, 1939. Joseph W. Stewart, Clerk.

Appellants' cross designation of record on certiorari

The appellants respectfully request that the Clerk, in the preparation of the transcript of record on petition for certiorari to the Su-

preme Court of the United States, include therein, in addition to the papers and proceedings designated in appellees' "Designation of Record," the following additional papers and proceedings:

1. No. 3056 Original—that portion of Exhibit C to Appellees' "Objections to Petition for Temporary Injunction" (designated and numbered 3 in Appellees' said designation) which is entitled "Points and Authorities on Motion to Dismiss."

2. Minute entry of November 8, 1939, showing granting of motion to substitute Charles Edison, Individually and as Acting Secretary of the Navy of the United States, as a party appellee.

3. No. 3056 Original—Minute entry of November 8, 1939, showing granting of motion to substitute Charles Edison, Individually and as Acting Secretary of the Navy of the United States, as a party appellee.

4. This cross designation.

O. MAX GARDNER,
O. Max Gardner,
ROBERTS B. THOMAS,
Roberts B. Thomas,
FREDERICK H. KNIGHT,
Frederick H. Knight,
Attorneys for Appellants.

Service of the foregoing cross designation is acknowledged this 15th day of November 1939.

ROBERT H. JACKSON,
Solicitor General.

United States Court of Appeals for the District of Columbia

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing printed and typewritten pages numbered from 1 to 455, inclusive, constitute a true copy of the transcript of the record and proceedings of the said Court of Appeals as designated by counsel in the case of Luckens Steel Company, a Corporation; Alan Wood Steel Company, a Corporation, South Chester Tube Company, a Corporation, et al., Appellants vs. Frances Perkins, Individually and as Secretary of Labor of the United States; Charles V. McLaughlin, Individually and as Assistant Secretary of Labor of the United States; L. Metcalfe Walling, Individually and as Administrator of the Division of Public Contracts of the Department of Labor of the United States, et al., Nos. 3056 Original and 7368, October Term, 1939, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 24th day of November, A. D. 1939.

[SEAL]

JOSEPH W. STEWART,
Clerk of the United States Court of Appeals for the District of Columbia.

U. S. GOVERNMENT PRINTING OFFICE: 1939

Supreme Court of the United States.

Order allowing certiorari

Filed February 5, 1940

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

GOVERNMENT PRINTING OFFICE 1940

No. 593

In the Supreme Court of the United States

OCTOBER TERM, 1939

FRANCES PERKINS, INDIVIDUALLY AND AS SECRETARY OF LABOR OF THE UNITED STATES; CHARLES V. MCLAUGHLIN, INDIVIDUALLY AND AS ASSISTANT SECRETARY OF LABOR OF THE UNITED STATES; L. METCALFE WALLING, INDIVIDUALLY AND AS ADMINISTRATOR OF THE DIVISION OF PUBLIC CONTRACTS OF THE DEPARTMENT OF LABOR OF THE UNITED STATES; ET AL., PETITIONERS

v.

LUKENS STEEL COMPANY, A CORPORATION; ALAN WOOD STEEL COMPANY, A CORPORATION; SOUTH CHESTER TUBE COMPANY, A CORPORATION; ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. ——

FRANCES PERKINS, INDIVIDUALLY AND AS SECRETARY OF LABOR OF THE UNITED STATES; CHARLES V. MCLAUGHLIN, INDIVIDUALLY AND AS ASSISTANT SECRETARY OF LABOR OF THE UNITED STATES; L. METCALFE WALLING, INDIVIDUALLY AND AS ADMINISTRATOR OF THE DIVISION OF PUBLIC CONTRACTS OF THE DEPARTMENT OF LABOR OF THE UNITED STATES; ET AL., PETITIONERS

v.

LUKENS STEEL COMPANY, A CORPORATION; ALAN WOOD STEEL COMPANY, A CORPORATION; SOUTH CHESTER TUBE COMPANY, A CORPORATION; ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General, on behalf of Frances Perkins, Secretary of Labor, and the other defendants in this action, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia, which reversed the judgment of the District Court dismissing the complaint.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia (R. 388–410) has not yet been reported.

JURISDICTION

The decision of the Court of Appeals for the District of Columbia was announced on August 4, 1939 (R. 387–388), and its judgment was entered on October 3, 1939 (R. 410). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Respondents are steel manufacturers which, dissatisfied with the determination under the Public Contracts Act of minimum wages to be paid by Government steel contractors, brought suit to enjoin enforcement of the determination. The questions are:[1]

1. Whether the respondents have standing to maintain this action.

2. Whether this suit is against the United States, which has not consented to be sued.

---

[1] Other questions, which will be urged if the petition for a writ of certiorari is granted, are:

1. Whether a wage determination by the Secretary of Labor under the Public Contracts Act is subject to judicial review in this proceeding.

2. Whether the complaint states a cause of action for an injunction.

3. Whether the respondents have exhausted their administrative remedies.

4. Whether the complaint states a cause of action for a declaratory judgment.

5. Whether the Court of Appeals properly granted the injunction *pendente lite* in this cause and whether the terms of that injunction were correct.

3. Whether the wage determination is void because arbitrary, capricious, or erroneous in law.

STATUTE INVOLVED

The statute involved, known as the Public Contracts Act, approved June 30, 1936, c. 881, 49 Stat. 2036, is printed in the Appendix, *infra*, pp. 20–26.

STATEMENT

The allegations of fact in the complaint (R. 3–45) and in the exhibits annexed to the complaint (R. 45–259), and the applicable provisions of the Public Contracts Act may be summarized as follows:

The respondents are seven corporations engaged in the manufacture and sale of products of the iron and steel industry, and are classified in that industry "as either medium-sized or small companies" (R. 9). Five of these companies have their manufacturing plants in Pennsylvania, one in Connecticut, and one in Maryland (R. 3–9). They pay a minimum hourly wage to common laborers of less than 62½ cents and ranging from 52½ cents to 56½ cents (R. 3–9, 313). Some of these companies have in the past sold iron and steel products to various departments of the Government of the United States, and it is alleged that the respondents desire to bid on Government contracts (R. 4–9).

Section 1 of the Public Contracts Act (Appendix, *infra*, pp. 20–21) provides that in any Government contract for the manufacture or furnishing of supplies in an amount exceeding $10,000, there shall be included a stipulation that all persons employed by the con-

tractor in the performance of the contract will be paid not less than "the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract; * * *." Section 4 directs the Secretary of Labor to administer the Act and gives the Secretary or his authorized representative power to make investigations and findings and to make regulations to carry out the provisions of the Act.[2] Section 11 of the Act provides that the provisions requiring inclusion of representations with respect to minimum wages shall apply only to contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

On July 11, 1938, the Administrator of the Division of Public Contracts notified manufacturers of iron and steel products, including the respondents, that hearings would be held before the Public Contracts Board, created by the Secretary under the Act, to take testimony upon which recommendations would be made to assist the Secretary to determine the prevailing minimum wages. On July 25 and July 26 the Board held a hearing, at which the respondents were represented, and on November 19, 1938, the respondents received copies of the findings of fact, conclusions and recom-

[2] Other sections of the Act provide methods by which to determine if there has been, and penalties for, a breach of the stipulations (Secs. 1, 3, 5) and for exceptions, modifications and tolerances with respect to the stipulations (Sec. 6).

mendations of the Board dated October 27, 1938. The majority of two members of the Board recommended (R. 206–207) that the Secretary determine prevailing minimum wages of 45 cents an hour in twelve named southern states, and 62½ cents an hour in the remaining states. A minority of one member of the Board recommended the determination of prevailing minimum wages of 62½, 60, 56½, and 55 cents in four prescribed areas in the northern and western states (R. 207–218).

Respondents excepted to the recommendations made by the Board (R. 231-239) and, after a hearing before the Acting Secretary of Labor, the determination of January 16, 1939, was made. The determination differed from the recommendations of the Board by determining the prevailing minimum wages for six localities to be 45, 58½, 60 and 62½ cents an hour. One locality with a minimum wage of 62½ cents includes the places in which the respondents' plants are located (R. 239–254). The determination became effective on March 1, 1939 (R. 254).

Respondents on February 25, 1939 filed a complaint (R. 3–45) which prayed a temporary restraining order, a preliminary injunction and a final injunction against enforcement of the determination by the petitioners and prayed a declaratory judgment that the determination is invalid (R. 42–44). The petitioners are (a) the Secretary of Labor, the Assistant Secretary of Labor, and the Administrator of the Division of Public Contracts of the Department of Labor, charged with administration of the Act; and (b) the Secretary of the Treasury, the Director of the Procurement Divi-

sion of the Treasury, and the Secretaries of War, the Navy, the Interior, and the Postmaster General, who are alleged to control the award of Government contracts by their departments.

The complaint alleges, among other things, that the determination is invalid because of errors of law and because it is arbitrary and capricious in its construction of the word "locality" (R. 26–28); in its disregard of facts in the record and in the report of the Board (R. 27–30); and in making its determination without supporting evidence (R. 30–31).

The complaint alleges that invitations to bid on five contracts for the Navy Department which were about to be opened required the stipulation to pay the minimum wages fixed by the determination and that some of the respondents desired to bid on the contracts; that the petitioners, the Secretaries of the Treasury, Navy, War, Interior, and the Postmaster General intend to and, unless enjoined, will require the insertion of the stipulation in every contract awarded after March 1, 1939; and that large contracts are expected to be awarded (R. 33–36).

The complaint further alleges that, unless injunctive relief is granted, the respondents will suffer immediate and irreparable injury in that (1) they will be deprived of the right to bid on Government contracts without the wage stipulation; (2) that if they include the stipulation they might be estopped from claiming the invalidity of the determination or might be subject to the penalties under the Act; (3) that to obtain Government contracts they will be required as a practical matter to raise wage levels even for non-Government business;

(4) that they may be unable to compete with larger steel companies paying the minimum wage; and (5) that there is no adequate remedy at law.

On February 28, 1939, a limited temporary restraining order (R. 281–285) was entered. On March 6, 1939, the petitioners filed a motion to dismiss the complaint (R. 288–289), on the grounds, among others that: (a) the complaint failed to state a claim upon which relief could be granted or the action maintained; (b) the court lacked jurisdiction of the subject matter of the action; and (c) the facts alleged in the complaint showed that it was a suit against the United States. The temporary restraining order was dissolved, and the motion to dismiss of the petitioners was granted on March 14, 1939.

On March 17, 1939, the respondents filed, in the Court of Appeals, an original petition for an injunction, pending final hearing and determination of the cause on appeal (R. 337–355). After argument on March 22, 1939, the Court of Appeals, on March 27, 1939, granted an injunction, pending further order of that court, which enjoined all of the petitioners from continuing to enforce the determination (R. 372). On March 29, 1939, the petitioners filed a motion for reargument on the petition for an injunction pending appeal or, in the alternative, for argument to clarify the terms of the injunction and to determine the security. The above motion and the appeal from the order of the District Court were argued in the Court of Appeals on April 4, 1939 (R. 385–386). On April 13, 1939, the petitioners filed a motion to dissolve the temporary injunction

theretofore granted by the Court of Appeals (R. 386–387).

On August 4, 1939, in a *per curiam* opinion (Justice Edgerton dissenting) the Court of Appeals announced the reversal of the judgment of the District Court pursuant to opinions to be filed subsequently, and continued the temporary injunction in effect (R. 387–388). On October 3, 1939, the majority and minority opinions of the Court of Appeals were filed, the judgment of the District Court was reversed and the case was remanded with instructions to proceed in accordance with the opinion (R. 388–410). The Court of Appeals has never acted upon petitioners' motion of March 29, 1939 for clarification of the injunction *pendente lite* and for security.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia erred—

(1) In holding that the respondents have a legal right sufficient to maintain this action.

(2) In holding that the Acting Secretary of Labor's wage determination is subject to judicial review in this proceeding.

(3) In holding that this suit is not a suit against the United States.

(4) In holding that the complaint states a cause of action in equity for relief by injunction.

(5) In holding that the complaint states a cause of action for a declaratory judgment.

(6) In failing to hold that the complaint should be dismissed because the respondents have not exhausted their administrative remedies.

(7) In holding that the wage determination was not a valid exercise of discretion by the Secretary of Labor.

(8) In holding that the wage determination was arbitrary, capricious, and without warrant or authority of law.

(9) In granting respondents' motion for an injunction *pendente lite*, and in refusing to dissolve or clarify or to require security for such injunction.

REASONS FOR GRANTING THE WRIT

This case is of great importance with respect to the contracting and purchasing functions of the Government. It presents important questions as to (a) the extent to which a person, asserting merely a desire to bid for Government contracts, may obstruct or delay the Government's contracting and purchasing activities, and (b) the proper construction and administration of the Public Contracts Act, which in large part would be emasculated if the decision of the court below were finally to prevail.

I

The respondents have no legally protected right which will be injured by the inclusion in Government contracts of a stipulation requiring the payment of the minimum wages as determined by the Acting Secretary of Labor to be the prevailing minimum wages in the locality in which respondents' plants are situated. They have, therefore, no standing to complain of the determination or of the requirement on the part of contracting officers that contractors with the Government must pay the minimum wages required by the determination.

The respondents are mere prospective bidders on Government contracts. Neither the prevailing minimum wage determination nor the inclusion of the minimum wage stipulation in Government steel purchase contracts limits or controls the respondents in the conduct of their general iron and steel business. The requirements relate only to the terms of the contracts which the respondents and others may make with a particular customer—the United States. Only if the respondents wish to enter into contracts with the United States will they be required to pay the minimum wages called for by the determination, and they will be required to pay those wages only to such of their employees as are employed in the manufacture or furnishing of the materials used in the performance of the contract.

The settled distinction between the limits on the regulatory powers of government and those with respect to the conditions it may impose upon its vendors is pointed by a comparison of *Truax* v. *Raich*, 239 U. S. 33, with *Heim* v. *McCall*, 239 U. S. 175, decided four weeks later. In the *Truax* case the Court held unconstitutional, as a denial of equal protection of the laws, an Arizona statute which required that any employer of more than five workers should employ not less than 80% qualified electors or native born citizens of the United States. In *Heim* v. *McCall*, on the other hand, the Court sustained a New York statute which required that in the construction of public works by the state or a municipality, or by persons contracting with the state or a municipality, only citizens of the United

States should be employed. Compare, similarly, *Lochner* v. *New York*, 198 U. S. 45, with *Ellis* v. *United States*, 206 U. S. 246. That no person has a legal right to do business with the Government except upon such terms and conditions as the Government may prescribe would seem no longer open to argument.[3]

Revised Statutes, Sec. 3709, relied upon by respondents, has been construed to require Government officers to accept the bids of the lowest responsible bidders upon Government contracts. But it is settled that this statute is "for the protection of the United States, not of the seller", and confers no legal right upon bidders seeking Government contracts or even those conceded to be the lowest responsible bidders. *American Smelting & Refining Co.* v. *United States*, 259 U. S. 75, 78.[4]

In short, respondents complain only that the Government will not buy their steel unless they pay the stipulated wages. The contract provisions become operative only if respondents choose to bid and only if the contract is awarded to them. Any injury is both speculative and of their own choice. The courts afford no redress against governmental action which merely increases or sharpens competition. *Alabama Power*

[3] *Ellis* v. *United States*, *supra*; *Heim* v. *McCall*, *supra*; *Atkin* v. *Kansas*, 191 U. S. 207; *Colorado Paving Co.* v. *Murphy*, 78 Fed. 28 (C. C. A. 8th); *United States Wood Preserving Co.* v. *Sundmaker*, 186 Fed. 678 (C. C. A. 6th); *O'Brien* v. *Carney*, 6 F. Supp. 761 (D. C. Mass. 1934); *Campbell* v. *City of New York*, 244 N. Y. 317, 155 N. E. 628 (1927).

[4] See also *United States* v. *New York & Porto Rico Steamship Co.*, 239 U. S. 88, 92–93; *Colorado Paving Co.* v. *Murphy*, *supra*; *O'Brien* v. *Carney*, *supra*; *United States Wood Preserving Co.* v. *Sundmaker*, *supra*.

Co. v. *Ickes,* 302 U. S. 464; *Tennessee Power Co.* v. *T. V. A.,* 306 U. S. 118. *A fortiori,* they afford no redress for the added cost of doing business with the Government upon its terms.

The very nature of the Secretary's determination adds weight to the barriers preventing attack in the courts. It is not an order; it commands none to do any act; it subjects none to any liability, civil or criminal; it withholds no license. It simply finds the prevailing minimum wages which must be paid by respondents if they are to sell to the Government. The determination, under settled principles of judicial review, may not be reexamined by the courts. *United States* v. *Los Angeles & Salt Lake R. Co.,* 273 U. S. 299, 309–310; *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 130–131.

II

The respondents' efforts by injunction to restrain and interfere with the contracting and purchasing activities of the Government must fail because the respondents' complaint is, in effect, a suit against the United States.

Whether a suit will be deemed in legal effect to be against the United States depends, of course, upon the effect of the decree sought, not upon the mere joinder or nonjoinder of the United States as a formal party to the action. *Louisiana* v. *McAdoo,* 234 U. S. 627, 629; *Goldberg* v. *Daniels,* 231 U. S. 218, 221–22. The contracts which the respondents hope to enter into are, clearly, contracts with the United States, not with any of the petitioners. In seeking to control the official

acts of the petitioners, the respondents are in fact seeking to interfere with the contracting and purchasing activities of the United States. A suit for an injunction which would enforce a contract of the United States is a suit against the United States. *Wells* v. *Roper*, 246 U. S. 335; *Transcontinental & Western Air, Inc.* v. *Farley*, 71 F. (2d) 288 (C. C. A. 2d); *Johnstown Coal & Coke Co.* v. *Wilson*, 60 F. (2d) 557 (E. D. N. Y.). By the same token, a suit for an injunction which seeks to exclude certain designated terms and conditions from proposed Government contracts is a suit against the United States.

The instant case does not fall within the recognized category where relief by a suit against federal officials may be obtained. The action brought by the respondents is not to protect any legal right from threatened invasion. The wage determination of the Acting Secretary of Labor was made pursuant to the provisions of the Public Contracts Act, and solely in the Secretary's official capacity. The determination was clearly based upon the exercise of official discretion. Finally, the relief sought by the respondents cannot be granted without judicial interference with the procedures and functions of the Federal Government.

It is as necessary for the Government to buy and to contract as it is for the Government to tax. The ordinary functions of the Government, to say nothing of the needs for national defense, cannot be carried on without buildings, furnishings, and supplies. The purchasing and contracting activities of the Government are in no sense regulatory in character and do not

subject individuals or private interests to any restraint. It would be an entirely novel principle, and a serious threat to the efficient and flexible functioning of the Government, if the courts should undertake to interfere with or control the Government's purchasing activities. If a single disgruntled merchant, dissatisfied with regulations governing eligibility to bid or to obtain an award, may, by invoking the aid of the courts, tie up or hamper the purchasing activities of the Government, the consequences are likely to be far-reaching and serious.

III

The court below held that the Acting Secretary of Labor committed a plain error of law in his construction of the term "locality" as used in the Public Contracts Act. The respondents have urged that the term "locality" means "the city, county, village or other civil subdivision of a State in which work under a particular Government contract is to be performed, or the immediate vicinity of that place, or, at most, a small geographical area" (R. 26). The majority of the court below appears in general to have agreed with these contentions, and for that reason held the determination invalid.

1. To apply to the Public Contracts Act the construction of "locality" adopted by the court below, would defeat the purposes of the Act and make it extremely difficult of administration. Many products or commodities which the Government customarily purchases are furnished or manufactured at hundreds of differ-

ent points throughout the country. If the prevailing minimum wage must be ascertained for each narrowly-restricted geographical area of which a point of production is the focus, in advance of inviting bids, an enormous amount of preliminary work on the part of the Department of Labor will have to be performed. The bulk of this work would be useless, since there would be no way to tell in advance from what cities, towns, or counties bids might be submitted. The construction of the word "locality" adopted by the Acting Secretary— i. e., a construction under which the word means an area of small or large extent according to the economic facts of the particular industry, seems plainly to be the only sensible construction from an administrative standpoint.

Furthermore, the construction adopted below would wholly defeat the obvious policy of the Public Contracts Act. Its plain purpose is to ensure that Government contractors pay not less than prevailing minimum wages, and to eliminate sub-standard wages as a competitive element in bidding. The word "locality" was, no doubt, inserted in order to authorize and direct the Secretary of Labor to take account of geographic differentials in wage scales. But if the word "locality" should be construed as necessarily meaning a very small area such as a town or a city, the Act would be robbed of its intended effect. In the iron and steel industry, for instance, there are numerous towns, cities, villages, or counties in various parts of the country where there is but one steel plant. These plants, of course, compete with others in different cities and

towns. Under the construction adopted by the court below, the prevailing minimum wage at each such plant would be the wage actually being paid, and the determinations by the Secretary would merely confirm existing wage scales at each plant. Such a construction reduces the Act to a futile gesture.

2. In 1931 the Davis-Bacon Act (c. 411, 46 Stat. 1494) was enacted, to fix minimum wages in the case of construction contracts for Government buildings. That Act, as amended in 1935 (c. 825, 49 Stat. 1011), provided that the minimum wages on such construction projects should be based upon the prevailing wages "in the city, town, village, or other civil subdivision of the State in which the work is to be performed". The language of the Davis-Bacon Act was appropriate for the problem of regulating minimum wages in connection with construction contracts, which necessarily can be performed at only one place. But it would have been entirely inappropriate for use in the Public Contracts Act, which deals not with work on construction projects, but with work in the manufacture or furnishing of Government supplies. Here the field is broad and suppliers who normally compete for Government contracts are widely separated. Congress in the Public Contracts Act accordingly did not use the language of the Davis-Bacon Act, but substituted for the phrase "city, town, village, or other civil subdivision of the State in which the work is to be performed" the more flexible work "locality."

3. The construction of the Public Contracts Act by the court below is in contradiction of the adminis-

trative construction.[5] This contemporaneous administrative construction, which accords with the purposes and requirements of the Act and is certainly not plainly erroneous, should be given great weight by the courts. *Norwegian Nitrogen Co.*, v. *United States*, 288 U. S. 294, 315; *Armstrong Co.* v. *Nu-Enamel Corp.*, 305 U. S. 315, 330.

4. Judicial decisions construing the word "locality" lend full support to the administrative construction. It goes without saying that, in appropriate context and circumstances, the word "locality" can be and is used to designate a small "local" area. But it is well settled that the word "locality" has a relative meaning, and that the context determines its meaning in each case. *Connally* v. *General Construction Co.*, 269 U. S. 385, 394.[6]

The Public Contracts Act is not the first statute in which Congress has employed the word "locality" as a flexible term of broad meaning. Section 3, paragraph (1) of the Interstate Commerce Act (49 U. S. C. Supp.

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[5] The administrative construction has been wholly consistent in result, although divergent theories have been applied. In some cases the requirement of "locality" has been read as not modifying "persons employed on similar work." See e. g., *In the Matter of Determination of Prevailing Minimum Wages in the Men's Work Clothing Industry*, 2 Fed. Register, Part 1, p. 233. In other cases, as here, the term "locality" has been given a reasonably broad interpretation.

[6] Compare the varying content given the term "locality" in *Ruark* v. *International Union of Operating Engineers*, 157 Md. 576, 146 Atl. 797 (1929); *Murphy* v. *Worcester Consolidated Street Ry. Co.* 199 Mass. 279, 85 N. E. 507; *State* v. *Fremont, E. & M. V. R. R. Co.*, 22 Neb. 313, 35 N. W. 118 (1887); *Foster* v. *Hart*

IV, Sec. 3 (1)), makes unlawful "any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality * * *." See also Section 13, paragraph (4) of that Act (49 U. S. C. Supp. IV, Sec. 13). In *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627, the Court stated (p. 638) that:

> The word "localities," therefore, has its proper office as denoting the origin or destination of traffic and the shipping, producing, and consuming areas affected by rates and practices of carriers.

There is, under the Public Contracts Act, at least an equal necessity that the term "locality" be read in light of the Congressional purpose and the economic practices of the industry.

The word is also used in Section 1 of the Cattle Contagious Diseases Act of Feb. 2, 1903 (c. 349, 32 Stat. 791; 21 U. S. C. Sec. 121), and in Section 7 of the Plant Quarantine Act of Aug. 20 1912 (c. 308, 37 Stat. 317; 7 U. S. C. Sec. 160). In both instances it is clear from the subject matter and purposes of the statutes that the word "locality" was not intended to have a narrow or restricted meaning, such as was adopted in the present case by the court below.[1]

Consolidated Mining Co., 52 Col. 429, 122 Pac. 54 (1912); *Severance* v. *Murphy*, 67 S. Car. 409, 46 S. E. 35 (1902); *Pierce* v. *Dillingham*, 96 Ill. App. 300 (1901).

[1] In administering the Plant Quarantine Act (which authorizes the Secretary of Agriculture to forbid the importation of plants from a "country" or "locality" where a plant disease exists) the Secretary of Agriculture has prohibited the importation of designated products from the provinces of Canada east of the eastern boundary of Manitoba (Quarantine No. 41, April 23, 1926).

5. The court below did not find error in the determination apart from the Secretary's construction of "locality." We shall not, therefore, undertake now to show that the determination was supported by the findings of fact. So far as respondents attempt to attack the findings as unsupported by the evidence, or the determination as arbitrary or capricious in the light of the evidence, it is clear that this Court is not now called upon to determine these questions, since the record does not include the evidence before the Secretary.

CONCLUSION

It is respectfully submitted that, for the reasons stated,[8] this petition for a writ of certiorari should be granted.

ROBERT H. JACKSON,
Solicitor General.

DECEMBER, 1939.

Those provinces do not constitute a "country," and therefore presumably were designated as a "locality." Certainly that order, in the light of the purposes of the Plant Quarantine Act, could not be held invalid merely because the Act spoke of "locality"; no more can the determination in the present case under the Public Contracts Act be held unwarranted for that reason.

[8] In the event that the petition for a writ of certiorari is granted, we shall also urge: (a) that the respondents' complaint fails to state a cause of action in equity for an injunction, because the allegations of irreparable damage are insufficient and because the allegations of immediate enforcement of the determination by petitioners are insufficient; (b) that the complaint fails to allege that the respondents have exhausted their administrative remedies; (c) that the complaint does not state a cause of action for a declaratory judgment; and (d) that the court below erroneously granted an injunction *pendente lite* and, in any event, that the terms of such injunction and the failure to require security therefor were erroneous.

APPENDIX

Act of June 30, 1936, known as the Public Contract Act, c. 881, 49 Stat. 2036; 41 U. S. C. Supp IV, secs 35–45:

AN ACT To provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:

(a) That the contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract;

(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries cur-

rently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;

(c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week;

(d) That no male person under sixteen years of age and no female person under eighteen years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract; and

(e) That no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are insanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima facie evidence of compliance with this subsection.

SEC. 2. That any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 1 hereof shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, the sum of $10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer

knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; and, in addition, the agency of the United States entering into such contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in section 1 hereof may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: *Provided*, That no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America.

SEC. 3. The Comptroller General is authorized and directed to distribute a list to all agencies of the United States containing the names of persons or firms found by the Secretary of Labor to have breached any of the agreements or representations required by this Act. Unless the Secretary of Labor otherwise recommends no contracts shall be awarded to such persons or firms or to any firm, corporation, partnership, or association in which such persons or firms have a controlling interest until three years have

elapsed from the date the Secretary of Labor determines such breach to have occurred.

SEC. 4. The Secretary of Labor is hereby authorized and directed to administer the provisions of this Act and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary to assist in the administration of this Act and to prescribe rules and regulations with respect thereto. The Secretary shall appoint, without regard to the provisions of the civil-service laws but subject to the Classification Act of 1923, an administrative officer, and such attorneys and experts, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as he may from time to time find necessary for the administration of this Act. The Secretary of Labor or his authorized representatives shall have power to make investigations and findings as herein provided, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act.

SEC. 5. Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of this Act, and on complaint of a breach or violation of any representation or stipulation as herein provided, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, fail-

ure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act.

SEC. 6. Upon a written finding by the head of the contracting agency or department that the inclusion in the proposal or contract of the representations or stipulations set forth in section 1 will seriously impair the conduct of Government business, the Secretary of Labor shall make exceptions in specific cases or otherwise when justice or public interest will be served thereby. Upon the joint recommendation of the contracting agency and the contractor, the Secretary of Labor may modify the terms of an existing contract respecting minimum rates of pay and maximum hours of labor as he may find necessary and proper in the public interest or to prevent injustice and undue hardship. The Secre-

tary of Labor may provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act respecting minimum rates of pay and maximum hours of labor or the extent of the application of this Act to contractors, as hereinbefore described. Whenever the Secretary of Labor shall permit an increase in the maximum hours of labor stipulated in the contract, he shall set a rate of pay for any overtime, which rate shall be not less than one and one-half times the basic hourly rate received by any employee affected.

SEC. 7. Whenever used in this Act, the word "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

SEC. 8. The provisions of this Act shall not be construed to modify or amend title III of the Act entitled "An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes", approved May 3, 1933 (commonly known as the Buy American Act), nor shall the provisions of this Act be construed to modify or amend the Act entitled "An Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes", approved March 3, 1931 (commonly known as the Bacon-Davis Act), as amended from time to time, nor the labor provisions of title II of the National Industrial Recovery Act, approved June 16, 1933, as extended, or of section 7 of the Emergency Relief Appropriation Act, approved April 8, 1935; nor shall the provisions of this Act be construed to modify or amend the Act entitled "An Act to provide for the diversification of employment of Federal prisoners, for their training, and schooling in trades and

occupations, and for other purposes," approved May 27, 1930, as amended and supplemented by the Act approved June 23, 1934.

SEC. 9. This Act shall not apply to purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market; nor shall this Act apply to perishables, including dairy, livestock and nursery products, or to agricultural or farm products processed for first sale by the original producers; nor to any contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof. Nothing in this Act shall be construed to apply to carriage of freight or personnel by vessel, airplane, bus, truck, express, or railway line where published tariff rates are in effect or to common carriers subject to the Communications Act of 1934.

SEPARABILITY CLAUSE

SEC. 10. If any provision of this Act, or the application thereof to any persons or circumstances, is held invalid, the remainder of the Act, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

SEC. 11. This Act shall apply to all contracts entered into pursuant to invitations for bids issued on or after ninety days from the effective date of this Act: *Provided, however,* That the provisions requiring the inclusion of representations with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

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No. 593

In the Supreme Court of the United States

OCTOBER TERM, 1939

FRANCES PERKINS, INDIVIDUALLY AND AS SECRETARY OF LABOR OF THE UNITED STATES; CHARLES V. MCLAUGHLIN, INDIVIDUALLY AND AS ASSISTANT SECRETARY OF LABOR OF THE UNITED STATES; L. METCALFE WALLING, INDIVIDUALLY AND AS ADMINISTRATOR OF THE DIVISION OF PUBLIC CONTRACTS OF THE DEPARTMENT OF LABOR OF THE UNITED STATES; ET AL., PETITIONERS

v.

LUKENS STEEL COMPANY, A CORPORATION; ALAN WOOD STEEL COMPANY, A CORPORATION; SOUTH CHESTER TUBE COMPANY, A CORPORATION; ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1939

No. 593

FRANCES PERKINS, INDIVIDUALLY AND AS SECRETARY OF LABOR OF THE UNITED STATES; CHARLES V. MCLAUGHLIN, INDIVIDUALLY AND AS ASSISTANT SECRETARY OF LABOR OF THE UNITED STATES; L. METCALFE WALLING, INDIVIDUALLY AND AS ADMINISTRATOR OF THE DIVISION OF PUBLIC CONTRACTS OF THE DEPARTMENT OF LABOR OF THE UNITED STATES; ET AL., PETITIONERS

v.

LUKENS STEEL COMPANY, A CORPORATION; ALAN WOOD STEEL COMPANY, A CORPORATION; SOUTH CHESTER TUBE COMPANY, A CORPORATION; ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The judgment of the District Court was entered without an opinion (R. 319–320). The opinions of the United States Court of Appeals for the District

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of Columbia (R. 388–410) is reported in 107 F. (2d) 627.

JURISDICTION

The decision of the Court of Appeals for the District of Columbia was announced on August 4, 1939 (R. 387–388), and its judgment was entered on October 3, 1939 (R. 410). The petition for a writ of certiorari was filed on December 16, 1939, and granted on February 5, 1940. The jurisdiction of this court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Respondents are steel manufacturers who, dissatisfied with the determination under the Public Contracts Act of minimum wages to be paid by Government steel contractors, brought suit to enjoin enforcement of the determination. The questions are—

1. Whether the respondents have standing to maintain this action.

2. Whether this suit is against the United States which has not consented to be sued.

3. Whether a wage determination by the Secretary of Labor under the Public Contracts Act is subject to judicial review.

4. Whether the complaint states a cause of action for an injunction.

5. Whether the wage determination is void because arbitrary, capricious, or erroneous in law.

6. Whether the complaint states a cause of action for a declaratory judgment.

STATUTE INVOLVED

The statute involved, known as the Public Contracts Act, approved June 30, 1936, c. 881, 49 Stat. 2036, is printed in Appendix A, *infra*, pp. 1–8. Certain other relevant statutes are also contained in that Appendix.

Section 1 of the Act provides that in any Government contract for the manufacture or furnishing of supplies in an amount exceeding $10,000 there shall be included a stipulation, among others, that all persons employed by the contractor in the performance of the contract will be paid not less than "the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract; * * *." Section 4 directs the Secretary of Labor to administer the Act and gives the Secretary or his authorized representatives power to make investigations and findings, to prosecute any inquiry necessary to his functions, and to make regulations to carry out the provisions of the Act. Section 11 of the Act provides that the provisions requiring inclusion of representations with respect to minimum wages shall apply only to con-

tracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

Other sections of the Act provide methods by which to determine if there has been, and penalties for, a breach of the stipulations (Secs. 1, 3, 5) and for exceptions, modifications, and tolerances with respect to the stipulations (Sec. 6). Sections 7, 8, 9 deal with definitions, previous acts unaffected by the Public Contracts Act, and types of purchases to which the Act is not applicable. Section 10 is the usual separability provision.

STATEMENT

The allegations of fact in the complaint as amended (R. 2–45, 313–318), and in the exhibits annexed to the complaint (R. 45–258), may be summarized as follows:

The respondents are seven corporations engaged in the manufacture and sale of products of the iron and steel industry (R. 3–9), and are classified in that industry "as either medium-sized or small companies" (R. 9). Five of these companies have their manufacturing plants in eastern and central Pennsylvania, one in Connecticut, and one in Maryland (R. 3–9). They pay a minimum hourly wage to common laborers of less than 62½ cents, and ranging from 52½ cents to 56½ cents (R. 3–9, 313). Six of the companies have in the past sold iron and steel products to various departments of the Government of the United States (R. 3–9),

and have generally realized profits from these sales (R. 313); it is alleged that all the respondents desire to bid on Government contracts (R. 4–9, 35).

On July 11, 1938, the Administrator of the Division of Public Contracts (created in the Department of Labor by order of the Secretary) notified manufacturers of iron and steel products, including the respondents, that hearings would be held before the Public Contracts Board created by the Secretary under the Act, to take testimony upon which recommendations would be made to assist the Secretary to determine the prevailing minimum wages (R. 15, 45–46). On July 25 and July 26, the Board held a hearing, at which the respondents were represented (R. 15–16), and on November 19, 1938, the respondents received copies of the findings of fact, conclusions, and recommendations of the Board dated October 27, 1938 (R. 17, 47–218). The majority of two members of the Board recommended (R. 18, 206–207) that the Secretary determine prevailing minimum wages of 45 cents an hour in twelve named southern states, and 62½ cents an hour in the remaining states. A minority of one member of the Board recommended the determination of prevailing minimum wages of 56½ cents in the region east of Altoona, Pa., 55 cents in certain midwest areas, and 60 cents in the far west, but agreed with the majority in other respects. (R. 19–20, 207–218.)

Respondents filed a petition to reopen the hearing before the Board (R. 20–21, 218–230) which

was denied by the Administrator of the Public Contracts Division (R. 21). Respondents then excepted to the recommendations made by the Board (R. 21–22, 231–239) and filed a brief in support thereof (R. 22). A hearing was held before the Acting Secretary of Labor, in which respondents participated (R. 22). The determination of the Acting Secretary, made on January 16, 1939, differed from the recommendations of the Board by determining the prevailing minimum wages for six localities to be 45, 58½, 60, and 62½ cents an hour (R. 24, 239–254).[1] All of the respondents are situ-

[1] "1. 45 cents per hour in the locality consisting of the states of Louisiana, Arkansas, Mississippi, North Carolina, South Carolina, Florida, Oklahoma, Texas, Alabama, Tennessee, Georgia, Virginia, and West Virginia (except the counties of Hancock, Brooke, Ohio, Harrison, Monongalia, and Marshall);

"2. 60 cents per hour in the locality consisting of the states of Washington, Oregon, and California;

"3. 60 cents per hour in the locality consisting of the states of Montana, Idaho, Nevada, Wyoming, New Mexico, Utah, Colorado, and Arizona;

"4. 58½ cents per hour in the locality consisting of the states of North Dakota, South Dakota, Nebraska, Kansas, Minnesota, Iowa, Missouri, and the area in and about East Saint Louis, Illinois;

"5. 62½ cents per hour in the locality consisting of the states of Wisconsin, Illinois (except the area in and about East Saint Louis, Illinois), Michigan, and Indiana.

"6. 62½ cents per hour in the locality consisting of Ohio, Pennsylvania, Delaware, Maryland, Kentucky, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, and Maine, and that portion of the state of West Virginia comprised within the counties of Hancock, Brooke, Ohio, Marshall, Harrison, and Monongalia, and the District of Columbia."

ated in the northeastern locality for which wages of 62½ cents were determined. The effective date of the determination was March 1, 1939 (R. 25, 254).

Respondents on February 25, 1939, filed a complaint (R. 2–45, amended R. 313–318), which prayed a temporary restraining order, a preliminary injunction, and a final injunction against promulgation of the determination by the Secretary of Labor, the Assistant Secretary of Labor, and the Administrator of the Division of Public Contracts, and against its enforcement by the other petitioners (R. 38–44). A declaratory judgment that the determination is invalid was also asked (R. 38, 44).

The petitioners are (a) the Secretary of Labor, the Assistant Secretary of Labor (who as Acting Secretary made the determination), and the Administrator of the Division of Public Contracts of the Department of Labor, charged with administration of the Act; and (b) the Secretary of the Treasury, the Director of the Procurement Division of the Treasury, and the Secretaries of War, the Navy, the Interior, and the Postmaster General, who are alleged to control the award of various Government contracts (R. 9–12).

The complaint alleges that the determination is invalid because (a) of its erroneous, arbitrary, and capricious construction of the word "locality" (R. 25–27; 313–315); (b) of its disregard of facts in the record of the hearings and the report of the Public Contracts Board showing the existence of well-defined and long-established wage differentials

among various districts in the locality in which respondents' plants were situated (R. 28–30, 315–316); (c) of the lack of evidence to support the determination that the area in which the respondents' plants were situated constituted a "locality in which materials * * * are to be manufactured or furnished" within the meaning of the Public Contracts Act (R. 30–31); and (d) of the failure to accord respondents a fair hearing, in that facts not contained in the record were considered, their request to reopen the hearings was denied, and the Acting Secretary was not impartial but was arbitrary and capricious (R. 31–32, 316).

The complaint alleges that invitations to bid on five contracts for the Navy Department, the bids pursuant to which were about to be opened, required a stipulation to pay the minimum ages fixed by the determination, and that some or all of the respondents desired to bid for these contracts if the determination did not become effective (R. 33–34, 316); that the petitioners intend to and unless enjoined will require the insertion of the stipulation in every iron and steel contract awarded after March 1, 1939 (R. 32, 34–35); and that numerous large contracts, upon which respondents desire to bid at prices which will enable them to make a profit, will be awarded in the immediate future (R. 35, 316–317).

The complaint further alleges that, unless injunctive relief is granted, the respondents will suffer immediate and irreparable injury in that (1) they

will be unlawfully deprived of the right to bid on Government contracts without the wage stipulation; (2) if they include the stipulations in their bids they might be estopped from claiming the invalidity of the determination or would, if unsuccessful in an attack upon its validity, be subject to harsh and excessive penalties under the Act; (3) to obtain Government contracts they will be required as a practical matter to raise wage levels even for non-Government business, and for laborers other than those receiving the minimum wage; (4) either by paying the minimum wages they will probably be unable to compete successfully with the larger companies already paying the minimum wages established by the determination, or by refusing they will lose a substantial source of revenue; and (5) there is no adequate remedy at law (R. 36–38).

On February 28, 1939, a limited restraining order against the Secretaries of Labor and the Navy was entered (R. 281–285). On March 6, 1939, the petitioners filed a motion to dismiss the complaint (R. 288–289) on the grounds that (a) the court lacked jurisdiction of the subject matter; (b) the complaint failed to state a claim upon which relief could be granted or a right entitling the action to be maintained; (c) no facts entitling the plaintiffs to equitable relief or to a declaratory judgment were stated; and (d) the facts alleged in the complaint showed that it was a suit against the United States. The temporary restraining order was dis-

solved, and the motion to dismiss was granted on March 14, 1939 (R. 319–320).

On March 17, 1939, the respondents filed, in the Court of Appeals, an original petition for an injunction pending final hearing and determination of the cause on appeal (R. 337–355). After argument before the entire bench on March 22, 1939, the Court of Appeals, on March 27, 1939, granted an injunction, pending further order of that court, which enjoined all of the petitioners from continuing to enforce the determination (R. 372). On March 29, 1939, the petitioners filed a motion for reargument on the petition for an injunction pending appeal or, in the alternative, for a clarification of the terms of the injunction and determination of the security (R. 373–380). The above motion and the appeal from the order of the District Court were argued in the Court of Appeals on April 4, 1939 (R. 385–386). On April 13, 1939, the petitioners filed a motion to dissolve the temporary injunction theretofore granted by the Court of Appeals (R. 386–387).

On August 4, 1939, in a *per curiam* opinion (Justice Edgerton dissenting) the Court of Appeals announced the reversal of the judgment of the District Court to be entered upon the opinions to be filed subsequently, and continued the temporary injunction in effect (R. 387–388). On October 3, 1939, the majority and minority opinions of the Court of Appeals were filed, the judgment was reversed, and the case was remanded with directions

to proceed in accordance with the opinion of the court (R. 388–410). The Court of Appeals has never acted upon petitioners' motion of March 29, 1939, for clarification of the injunction *pendente lite*, and for security.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia erred:

(1) In holding that the respondents have a legal right sufficient to maintain this action.

(2) In holding that the Acting Secretary of Labor's wage determination is subject to judicial review in this proceeding.

(3) In holding that this suit is not a suit against the United States.

(4) In holding that the complaint states a cause of action in equity for relief by injunction.

(5) In holding that the complaint states a cause of action for a declaratory judgment.

(6) In holding that the wage determination was not a valid exercise of discretion by the Secretary of Labor.

(7) In holding that the wage determination was arbitrary, capricious, and without warrant or authority of law.

SUMMARY OF ARGUMENT

I

The respondents have no standing to maintain this action, since they have no legal right which has been invaded. On settled principles, they can com-

plain of the asserted illegality of the Acting Secretary's determination, only if petitioners have committed acts which are tortious at common law or which violate a statutory privilege. Respondents urge that petitioners have tortiously interfered with a right to negotiate and bid for Government contracts, but it is clear that no common-law tort has been committed. Petitioners are not third-party intermeddlers, but are agents of the United States who, while they are alleged to have breached a duty owing to their principal, have violated no duty owing to the respondents. Furthermore, petitioners' acts are in no sense actionable or tortious at common law, and respondents have cited no case, authority or principle characterizing them as such.

No statutory privilege has been invaded. R. S. § 3709, requiring Government contracts to be let to the lowest responsible bidder, was enacted for the protection of the United States, not of the bidder, and has been uniformly interpreted not to confer any right even upon an unsuccessful lowest responsible bidder to set aside an award to another. The great majority of state decisions take the same view as to analogous state lowest bidder statutes. This accepted construction of R. S. § 3709 entirely destroys respondents' case. Respondents' attempt to distinguish a right to bid from the right to obtain an award must fail, since no one is obstructing respondents' right merely to bid. They must assert a right to have their bid not be rejected because

of the failure to include wage stipulations, and the decisions under R. S. § 3709 and similar statutes stand athwart their path. The Public Contracts Act, likewise, was adopted to benefit the public, not the respondents, and the latter can base no right upon it. The one case, *Harlan* v. *Employers' Ass'n of Maryland*, 162 Md. 124, 159 Atl. 267 (1932) which has passed upon this question has denied prospective bidders the right to sue.

The Public Contracts Act does not provide for judicial review of wage determination, a field in which Congress can constitutionally preclude judicial review. Section 5 of the Act, on which respondents have relied, relates only to quasi-judicial decisions on alleged violations of the terms of the Act by contractors, and not to quasi-legislative wage determinations. The genesis of the Act in the Davis-Bacon Act, and its legislative history, indicate that there was no Congressional intention to subject the Secretary's wage determinations to court scrutiny. Such review is inappropriate in a proceeding which is not part of a regulatory scheme.

Finally, the result of permitting respondents to maintain this action would be seriously obstructive to the contracting and purchasing activities of the Government, and would unnecessarily draw into the judicial sphere thousands of intricate questions of specifications, contract terms, etc. suitable only for administrative determination.

II

This suit is against the United States, which has not consented to be sued. The respondents have alleged that the petitioners, all of whom are officers of the United States, are acting outside of their statutory authority, but such an allegation alone does not establish that this suit is not against the United States. The relief sought here will control the terms of contracts which the Government enters into. The case is therefore squarely in line with previous decisions which have held that suits which seek to compel the performance of Government contracts, or which strip the Government of title to or possession of property, are suits against the sovereign, regardless of the officer's lack of authority. The relief sought will seriously interfere with and obstruct the Government's contracting and purchasing activities, which are purely executive functions; it is settled that a suit entailing such results is against the sovereign. The cases upon which the respondents rely involved suits seeking to restrain official acts which were regulatory in nature; such suits have been held to lie since the officer can be treated as a private wrongdoer, but are wholly irrelevant in the present case. No theory which is consonant with the decisions upholds the plaintiff's right to maintain this action.

III

Respondents have failed entirely to show the irreparable injury necessary to invoke equitable jurisdiction. The complaint alleges merely speculative damages. An injunction cannot be founded upon such a tissue of possibilities.

IV

The prevailing wage determination in question is a valid exercise of discretion conferred by the Public Contracts Act. The construction adopted in the Determination of the phrase "locality in which the materials * * * are to be manufactured" was entirely proper. Previous legislative, judicial, and administrative use of the term "locality," as well as its dictionary definitions, indicate that it has no such intrinsic meaning as to exclude the geographic units established in this case; on the contrary, the term has a flexible meaning depending upon the purpose for which and the context in which it is used. The aims and legislative history of the Public Contracts Act show that to restrict the term to a small geographic unit would contradict the intention of Congress, and defeat the Act's objectives. The purpose of the Act was to preserve advanced labor standards and to prevent encouragement by the Government of sweat shop conditions, and the migration of industries to low-wage areas. To attain these ends,

the original drafts of the Act allowed the Secretary to establish minimum wages, but, as finally adopted, the Act provided for determination, in advance of the bidding on contracts, of the minimum wages prevailing in the localities within which materials are to be manufactured. Although adopting the "prevailing" standard of the Davis-Bacon Act (providing for the payment on Government construction contracts of wages prevailing in the city or town in which the building was being erected), Congress was careful to choose different terms, authorizing the designation of large geographic units, in order to effectuate the purpose of the Public Contracts Act.

In the light of these purposes and this history, the phrase "locality in which the materials * * * are to be manufactured" must be sufficiently broad in meaning to cope with the evil of industrial migration to low wage areas and sweatshops. The actual facts of many industries clearly indicate this need. Administrative construction by the Secretary supports this interpretation. Likewise, support is gathered from the obvious administrative difficulties which would result from restricting the phrase to small geographic units.

The Court should not, on settled principles of review of administrative actions in injunction or mandamus proceedings, disregard the administrative construction of the statute unless it is palpably erroneous and arbitrary. This it certainly cannot be said to be.

The establishment of wage determinations is a legislative not a judicial function, and hearings are not required to be held. Accordingly, a wage determination need not be supported by the evidence adduced at a formal hearing, and there can be no judicial reexamination of the Acting Secretary's action, absent an averment of bad faith. However, the determination is fully supported by the evidence, and the painstaking care with which it was made demonstrates the lack of the elements of arbitrariness. The respondents were accorded an entirely fair hearing, whether one need have been held or not.

V

Nor does the complaint state a cause of action for declaratory relief. If injunctive relief is not granted, a declaratory judgment should not issue since it will be equivalent in every way, to an injunctive command against the Government officials who are the defendants. The Court should not issue a judgment which will seriously contravene the established policy of flexible and free functioning of the contracting and purchasing activities of the Government.

ARGUMENT

The respondents have heretofore laid the greatest emphasis upon and devoted the bulk of their argument to their contention that the wage determination is based upon an erroneous construction of the

Public Contracts Act, and is therefore invalid. We believe that contention to be entirely without foundation, and the final section of this brief presents a full argument on the question. However, we think that there is no occasion for this Court to consider or pass upon the validity of the determination in this case. First, because the respondents have entirely failed to show that they have any legal right or standing sufficient to enable them to attack the determination. Second, because the suit is brought against the United States without its consent.

I

THE RESPONDENTS HAVE NO STANDING TO MAINTAIN THIS ACTION, SINCE THEY HAVE NO LEGAL RIGHT WHICH IS DENIED OR INJURED BY THE ACTION OF WHICH THEY COMPLAIN

The respondents have instituted an entirely unprecedented type of action. The "rights" which they seek to assert have never been recognized by the courts. So far as we have been able to discover, a right in prospective bidders to challenge prevailing wage determinations for public contracts by public officers has been asserted in but one reported case, and in that case the existence of such a right was summarily denied. *Harlan* v. *Employers' Assn. of Md.*, 162 Md. 124, 159 Atl. 267 (1932). A similar result, we submit, is compelled here.

A. THE RESPONDENTS HAVE STANDING ONLY TO RESIST TORTIOUS ACTION BY THIRD PARTIES OR TO VINDICATE A STATUTORY PRIVILEGE

Settled principles and respondent's concessions reduce to a narrow compass the issues which determine respondent's standing to sue.

It should be made clear at the outset that neither the Secretary of Labor's prevailing wage determination, nor the subsequent inclusion in Government steel purchase contracts of a stipulation requiring payment of not less than the wages so determined, in any way interferes with the respondents' general right to conduct their iron and steel business. Obviously, such requirements relate only to the terms upon which the respondents may do business with a particular customer—the United States Government. Only if the respondents wish to enter into contracts with the United States will they be required to pay the wages called for by the determination, and they will be required to pay those wages only to such of their employees as are engaged in the manufacture of the materials used in the performance of the contract. Accordingly, if the respondents have any right which is to be protected in this case, it is not a right to do business generally, but simply a right to do business with the United States.

The issue is refined still further by application of the elementary proposition that no one can complain of the refusal of another to have dealings or

enter into contracts with him, no matter for what reason. *Federal Trade Commission* v. *Raymond Bros.-Clark Co.*, 263 U. S. 565; *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, 227 Fed. 46 (C. C. A. 2d); Cooley on Torts (1880), p. 278. Like any private individual, the Government has the privilege of deciding on what terms it will do business with others. This rule is no longer open to question. *Atkin* v. *Kansas*, 191 U. S. 207; *Ellis* v. *United States*, 206 U. S. 246; *Heim* v. *McCall*, 239 U. S. 175; *Campbell* v. *City of New York*, 244 N. Y. 317, 155 N. E. 628 (1927). Indeed, the respondents concede that they have no legal right to do business with the Government except upon such terms and conditions as the Government may prescribe (Br. in Opp. p. 37).

Respondents, consequently, define the right which they assert as the right "to bid and negotiate for Government contracts free of limitations or conditions other than those imposed or authorized by Congress" (Br. in Opp. p. 20). Thus, the controversy narrows itself to respondents' standing to enjoin action under a valid statute prescribing the conditions under which one may contract with the Government. Capacity to maintain the suit is said to exist because the action of the officials applying the statute is charged to be erroneous and illegal, and thus to leave them stripped of their governmental authority. The petitioners, therefore, are said to have the status of private intermeddlers and accordingly to be liable for their

interference with respondents' potential contracts with the Government (Br. in Opp., pp. 31–39).

Respondents, then, pitch their case upon the proposition that petitioners, wanting statutory authority, act as private persons and are subject to accepted restraints against unlawful interference with contract relations by third parties. See *Truax* v. *Raich*, 239 U. S. 33; *Pierce* v. *Society of Sisters*, 268 U. S. 510. But, even if it be assumed that petitioners have the status of individuals and of third parties, respondents must face other insuperable obstacles to maintenance of this suit. Respondents must, in addition, show that the actions of the petitioners, regardless of the "legality" of those actions, invade some protected legal rights of the respondents. The right must be "one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege" or else the respondents have no standing to attack the wage determination. *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U. S. 118, 137–8. See also *Alabama Power Co.* v. *Ickes*, 302 U. S. 464; *Louisiana* v. *McAdoo*, 234 U. S. 627, 631; *Massachusetts* v. *Mellon*, 262 U. S. 447.

Respondents do not dispute the accuracy or the applicability of this rule, nor do they urge that they assert rights based upon property or upon contract. The issue, therefore, is narrowed to respondents' alternative contentions, that petitioners threaten an unlawful or tortious interference with respond-

ents' right to bid on government contracts (Br. in Opp., pp. 31–33), or that respondents have a statutory privilege to enjoin illegal action by petitioners (Br. in Opp., pp. 33–37). The succeeding sections of this point show that neither proposition is tenable.

B. PETITIONERS HAVE NOT COMMITTED OR THREATENED TO COMMIT ANY TORTIOUS ACTS

We think it evident that the petitioners have committed no act which violates the respondents' common-law rights and thereby constitutes a tort. The respondents allege that they desire to bid and negotiate for and enter into contracts with the United States. In carrying on such business they are, no doubt, entitled to legal protection against certain types of interference. One may suppose that if a competitor of the respondents by force or deceit prevented them from delivering bids to Government contracting officers, the competitor could be held liable for or enjoined from interfering with the respondents' business transactions. But their right to do business with the Government is not interfered with in such a way as to constitute a tort unless at least two factors are present. First, the interference must be by a third party, not by the Government itself. For, like any private person, the United States may refuse to enter into contracts with the respondents for any reason or no reason. Consequently, the respondents must show that the petitioners, all of whom are Federal officers, are "third parties" with respect to transactions be-

tween the respondents and the United States. Second, the interference must be of an unlawful type. But third parties do not commit torts *merely* by preventing or obstructing business between others. The obstructive acts of third parties must be wrongful—coercive, fraudulent, dishonest, malicious, or otherwise unjustifiable—or they will not be considered torts.

1. Petitioners are not third parties as between respondents and the United States

In the field of public contracts, it would seem sufficiently obvious that petitioners are not third parties between respondents and the Government. But the respondents earnestly claim that the petitioners "were acting as individuals, and therefore, as third parties *vis-à-vis* respondents and the Government" (Br. in Opp. p. 32).

Obviously, the petitioners are no mere strangers to negotiations between the respondents and the United States for Government contracts. As regards petitioner Perkins (and her subordinates, petitioners McLaughlin and Walling), the Public Contract Act imposes upon her the duty of making prevailing wage determinations, and requires public contracts to contain stipulations embodying the wages so determined. Petitioners Morgenthau, Peoples,[2] Edison, Woodring, Ickes, and Farley are

[2] With respect to petitioner Peoples, respondents allege that he issues rules and regulations requiring the inclusion of specified provisions and stipulations in Government contracts (R. 10).

alleged by the respondents to control the award of Government contracts (R. 9–12).

It requires no demonstration that the United States Government is like a private corporation in that it can only negotiate for or enter into contracts through and by means of officers and agents. The respondents have suggested that petitioners are not "the Government" (Br. in Opp., p. 37), but it is quite clear that the respondents would have little success in negotiating or contracting with a corporate but incorporeal abstraction; they can only do business with officers and agents of the Government. And it is as officers and agents of the prospective purchaser that the petitioners must necessarily be regarded in determining whether their acts are tortious.

In ascertaining whether any common-law right of the respondents has been tortiously disregarded, therefore, the situation is identical with that which would be presented if the Government were a private individual or corporation, and the petitioners its agents. *Dibble* v. *New Haven*, 56 Conn. 199, 14 Atl. 210 (1888). The respondents cannot contest this analysis, since they concede that the Government, like any private person, can accept or decline to do business as it desires (Br. in Opp., p. 37), and since they insist that the petitioners—as officials acting outside their authority—be treated solely as individuals (Br. in Opp., pp. 32, 37, 40–41).

By hypothesis, accordingly, the problem is the same as though we assume that a private individual or corporation, desirous of purchasing products of the type sold by the plaintiffs, determines not to deal with any sellers paying substandard wages and directs its agent or officer to determine the prevailing minimum wage in the plaintiffs' locality. The agent or officer—not fraudulently, in bad faith, or with intent to injure the plaintiffs—incorrectly construes the term "locality" and therefore makes a determination contrary to the instructions of his principal. It is unthinkable that the agent or officer would be liable, on any theory of the law of torts, to the prospective sellers who failed to secure contracts because of the principal's refusal to deal with vendors paying less than the minimum wage as so determined. Nor could the plaintiffs enjoin the agent or officer from communicating his determination to his principal, nor enjoin purchasing agents or officers of the principal from giving effect to the determination.

We have been unable to discover any case holding or suggesting, or any writer who believes, that preventing the formation of a contract under the circumstances described would constitute a tort. Nor have the respondents cited any such authorities.

Indeed, the above circumstances might be radically aggravated without alteration of the result. The principal might have no interest in the matter of prevailing wages, and the agent or officer might decline to enter into contracts in violation of his

principal's instructions. But such acts at most would render the agent or officer liable to his principal. The breach of duty owing to the principal would not in itself make the agent or officer's act tortious toward potential contractors. The agent or officer's liability to third parties would have to rest on independent grounds.[3]

Petitioners are, in truth, simply agents of the Government who are alleged erroneously to have applied the standards of the Public Contracts Act. Accepted principles, designed to ensure public responsibility, might serve to make their status that of individuals rather than Government officers. But no legal principle can be found which would subject the public officer to a far greater vulnerability to suit than that of a private individual, on the fallacious theory that the officer's status is that of a third party intermeddler in the transaction, when in fact the officer is acting purely as an agent.

2. The petitioners' acts are not of a wrongful character

But even if it were assumed that petitioners had the status of third parties, it is not enough that the respondents assert generally that the petitioners are guilty of "unjustifiable interference" with negotiations and dealings (Br. in Opp., p. 32),

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[3] Restatement of Agency, § 352, 357; *French* v. *Fuller*, 23 Pick. (Mass.) 108 (1839); *Coe v. Ware*, 271 Mass. 570, 573, 171 N. E. 732, 733 (1930); *Ross* v. *Wright*, 286 Mass. 269, 190 N. E. 514 (1934); *Ultramares* v. *Touche, Niven & Co.*, 255 N. Y. 170 (1931); *Dibble* v. *New Haven*, 56 Conn. 199, 14 Atl. 210 (1888).

and thereupon conclude that the petitioners' acts are tortious. In fact, none of the factors are present which the courts have always required as a basis for characterizing action as a tortious interference with actual or potential contract relations.

Obviously, the petitioners have not induced any breach of contract, since the respondents claim that they are being prevented from entering into contracts.[4] Nor have the petitioners disparaged the quality of respondents' goods,[5] nor do we understand that any claim of personal defamation is made or could be made.

Insofar as the petitioners may have prevented the formation of contracts, none of the elements of tortious conduct are present. In this field the broadest formulation of liability seems to be that stated in *Union Car Advertising Co. Inc.* v. *Collier*, 263 N. Y. 386, 401, 189 N. E. 403, 409 (1934):

> A cause of action has also been recognized where a party *would* have received a contract but for the malicious, fraudulent, and deceitful acts of a third party, such, for instance, as materially lying about him * * * [citing cases]. There must be some certainty that the plaintiff would have gotten

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[4] See Carpenter, *Interference with Contract Relations* (1928), 41 Harv. L. Rev. 728; Sayre, *Inducing Breach of Contract* (1923), 36 Harv. L. Rev. 663; Harper, *Treatise on the Law of Torts*, § 231–32; Comment (1938), 37 Mich. L. Rev. 115.

[5] Restatement of Torts, § 627, § 650; Harper, *op. cit. supra*, § 276.

the contract but for the fraud. This cannot be left to surmise or speculation.

See also *Goldman* v. *Harford Road Bldg. Assn.*, 150 Md. 677, 133 Atl. 843 (1926). As shown above, the petitioners are not "third parties," as is required by the rule so stated; they are agents and officers of the prospective buyer. Nor is there any allegation that the petitioners' acts were malicious, fraudulent, or deceitful, or that the petitioners were guilty of any material untruths. Nor is there any certainty whatsoever that the respondents would have received any contracts but for the petitioners' acts. They are merely prospective bidders. See *Matter of Martin Rooney*, 26 Misc. 73, 74, 56 N. Y. Supp. 483 (1899).

Needless to say, the mere fact that the petitioners are Government officers does not affect the results clearly dictated by the foregoing principles. Assuming that they misconstrued a statute, even violently, such a mistake is uniformly held not to constitute a tort in and of itself. Even if the erroneous construction was "arbitrary, capricious, and malicious," no tortious liability is thereby created at common law.[6] Furthermore, while there is no claim of defamation, it has been uniformly held that Cabinet Officers are absolutely privileged to

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[6] *Standard Nut Margarine Co.* v. *Mellon*, 72 F. (2d) 557, 559 (App. D. C.), certiorari denied, 293 U. S. 605; *Cooper* v. *O'Connor*, 105 F. (2d) 761 (App. D. C.); *Fletcher* v. *Wheat*, 100 F. (2d) 432 (App. D. C.), certiorari denied, 307 U. S. 621; *Lang* v. *Wood*, 92 F. (2d) 211 (App. D. C.).

defame private persons or disparage the quality of their property if such action is taken in the course of the "exercise of an Executive function, if the matter has some relation to the Executive proceeding in which the officer is acting."[7]

The respondents lay great stress upon the fact that they will be injured in their competitive relations with other iron and steel manufacturers. They claim to be less able than their competitors to pay the prevailing minimum wage (62½¢ per hour) established by the Secretary of Labor's determination. But it is now conclusively determined that the mere fact that the respondents may suffer in competition with their competitors affords them no ground for complaint. The competition from which they will suffer is entirely lawful. In a succession of cases, this Court has held that one cannot complain of injury to one's business arising out of competition, even though this competition may be fostered, aided, or made effective by Governmental action which is without either constitutional or statutory warrant. *Alabama Power Co.* v. *Ickes*, 302 U. S. 464; *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U. S. 118; *Louisiana* v. *McAdoo*, 234 U. S. 627; *Edward Hines Trustees* v. *United States*, 263 U. S. 143; *Sprunt & Son* v. *United States*, 281 U. S. 249.

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[7] Restatement of Torts, § 591, § 641; *Spalding* v. *Vilas*, 161 U. S. 483, 498; *Mellon* v. *Brewer*, 18 F. (2d) 168 (App. D. C.); *De Arnaud* v. *Ainsworth*, 24 App. D. C. 167.

No other recognized version of the *prima facie* theory of tort—that one is liable for any intentional injury to another unless justified (see *Aikens* v. *Wisconsin*, 195 U. S. 194, 204)—can be invoked to brand the petitioners as tort-feasors. Unless the Court is to develop new common-law torts for purposes of this case, it must deny the respondents' standing to sue.

The cases relied on by the respondents do not support their contentions. All of them involve the elements of coercion, fraud, bad faith, malice, conspiracy, or intimidation, which the courts, as in the *Alabama Power* and *Tennessee Valley Authority* cases, *supra*, have regarded as essential if a tort is to be spelled out of interference with business dealings.

The present case involves no physical intimidation of possible customers.[8] Other cases cited by the respondents involved threats of prosecution or litigation made by individuals in bad faith, with the purpose of intimidating the plaintiff's customers.[9] But the respondents concede that such

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[8] *Tarleton* v. *McGawley*, 170 Eng. Rep. 153 (K. B. 1793); *Graham* v. *Street Railroad Company*, 47 La. Ann. 1656, 18 So. 707 (1895); *Roe* v. *Lundstrom*, 89 Utah 520, 57 P. (2d) 1128 (1936). Cf. *Deon* v. *Kirby Lumber Co.*, 162 La. 671, 111 So. 55 (1926).

[9] *Sparks* v. *McCreary*, 156 Ala. 382, 47 So. 332 (1908); *Emack* v. *Kane*, 34 Fed. 46 (C. C. N. D. Ill.); *Price-Hollister Co.* v. *Warford Corp.*, 18 F. (2d) 129 (S. D. N. Y.); *Dehydro, Inc.* v. *Tretolite Co.*, 53 F. (2d) 273 (N. D. Okla.).

acts are not tortious if done in good faith.[10] In one case it seems to have been held that noncompetitors may be enjoined from threatening customers with prosecution, even if the threats are made in good faith. *American Mercury Co., Inc.* v. *Chase,* 13 F. (2d) 224 (D. Mass.): But whether or not that decision be correct is of no importance here, since there is no allegation that the petitioners are threatening to prosecute the respondents or their customers.

Most of the cases cited by the respondents concern coercion by means of threats by public officers to institute criminal prosecutions under unconstitutional statutes, or prosecutions for which the statutes provided no basis. *Truax* v. *Raich,* 239 U. S. 33; *Pierce* v. *Society of Sisters,* 268 U. S. 510; *Terrace* v. *Thompson,* 263 U. S. 197; *Scully* v. *Bird,* 209 U. S. 481; *Crescent Mfg. Co.* v. *Mickle,* 216 Fed. 246 (D. Oreg.); *Pratt Food Co.* v. *Bird,* 148 Mich. 631, 112 N. W. 701 (1907); *State* v. *Cass County,* 17 N. D. 285, 115 N. W. 675 (1908). In still other cases outright trespasses were committed either by invasion of plaintiff's premises and the physical prevention of customers from entering, or by the seizure of goods.[11]

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[10] Brief in Court of Appeals, p. 118. See *Everybody's Tool & Die Wks., Inc.* v. *Costa,* 9 F. Supp. 440 (E. D. N. Y.).

[11] *Scully* v. *Bird, supra; American School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94, 110; *Waite* v. *Macy,* 246 U. S. 606; *Roe* v. *Lundstrom, supra,* note 8.

It therefore appears conclusively that the petitioners' acts which are sought to be enjoined violate no common-law rights of the respondents. Those acts are not intrinsically wrongful, and the petitioners' duty to construe the Public Contracts Act correctly is, so far as the common-law rights of the respondents are concerned, a duty owing solely to the Government, and not to the respondents. The fact that the wage determination, even if based upon a mistake of law, may unfavorably affect the respondents' competitive status constitutes no legal injury. Accordingly, unless the respondents can show that some *statutory* right or privilege has been denied or injured by the wage determination, they have no standing to maintain this action.

C. THE RESPONDENTS HAVE NO STATUTORY RIGHT OR PRIVILEGE WHICH HAS BEEN INVADED

The respondents have invoked two federal statutes which, they claim, confer upon them the right or privilege to bid and negotiate for Government contracts (Br. in Opp. pp. 33–37). One is Section 3709 of the Revised Statutes, requiring public advertising for proposals for Government contracts—the so-called low-bidder act.[12] The other

[12] R. S. § 3709 (41 U. S. C. § 5) provides:

Except as otherwise provided by law all purchases and contracts for supplies or services, in any of the departments of the Government, and purchases of Indian supplies, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate

is the Public Contracts Act itself. In order to support their right to maintain this action, the respondents must show that these statutes (or one of them) confer upon mere prospective bidders for Government contracts the right to insist in the courts that Government officers comply with the provisions of these acts. Furthermore, since it is not alleged that the petitioners have been guilty of any malice or bad faith, the respondents must establish a statutory privilege which enables them to attack, in the courts, the validity of official action taken in complete good faith under the statutes.

Before examining the two statutes in detail, it should be noted that the privilege which the respondents assert is misleadingly stated. They assert a right "to bid and negotiate for Government contracts free of limitations or conditions other than those imposed or authorized by Congress," and charge an invasion of that right by the petitioners as a result of the determination. In fact, except in certain limited situations which are not here involved, there is no "negotiation" for Government contracts other than bidding, for R. S. § 3709 requires that Government contracts be effected by inviting bids, and it has been construed to require

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delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals.

acceptance of the lowest bid from a responsible bidder.[13] But actually the determination in no manner prevents the respondents from bidding. Their real complaint is that bids will not be considered, and contracts will not be awarded, unless the prevailing minimum wages specified in the determination are to be embodied in the contract stipulations. The respondents have not purported to claim any privilege with respect to the *awarding* of contracts, but in fact they must. They are not merely asserting a right to bid, because (a) they are not being prevented from bidding, and (b) their right to bid is empty and protection of it futile unless they are protected with respect to the awards. Accurately stated, the privilege which the respondents assert is a privilege to have their bids not be rejected solely because of their failure to agree to comply with the prevailing wage determination.

1. R. S., Section 3709, confers no right upon the respondents which has been invaded

In considering the bearing of R. S. § 3709 upon the present case, it should be borne in mind that the statute does not *expressly* impose any limitations or requirements upon the *award* of Government contracts. In terms, it requires merely that contracts for supplies and services shall (except in emergencies) "be made by advertising a sufficient time previously for proposals respecting the

[13] *Infra*, pp. 34, 65.

same". The statute has, however, been uniformly construed to require the award of Government contracts to the lowest responsible bidder. *Scott* v. *United States*, 44 C. Cls. 524; *Schneider* v. *United States*, 19 C. Cls. 547; 22 Op. A. G. 1.

But the respondents have been unable to cite authority for the proposition that this statute confers any rights or privileges upon mere bidders, much less prospective bidders.[14] Their inability is

[14] The respondents have cited (Br. in Opp., pp. 35, 37) only a dictum in *United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 318. In that case the plaintiff's bid (to supply the Post Office Department with envelopes) had been accepted, and the contract awarded. Before the contract was formally approved and signed, a new Postmaster General cancelled the contract, and made a different contract for the same supplies with other contractors. The plaintiff sued the United States for damages in the Court of Claims. On appeal to this Court, the only questions presented were, as stated by the Court (249 U. S. at 317), whether there was a completed contract and the measure of damages. This Court held that a valid contract had come into existence, and affirmed the judgment for the plaintiff. It will be seen that the *Purcell* case has nothing to do with the present case. It concerns the rights of *contractors* not bidders. But the respondents rely upon the statement in the opinion (249 U. S. 313, 318):

"There must be a point of time at which discretion is exhausted. The procedure for the advertising for bids for supplies or services to the Government would else be a mockery—a procedure, we may say, that is not permissive but required (§ 3709, Rev. Stats.). By it the Government is given the benefit of the competition of the market and each bidder is given a chance for a bargain. It is a provision, therefore, in the interest of both Government and bidder, necessarily giving rights to both and placing obligations on both. And it is not out of place to say that the Government

not surprising, since it is entirely clear that R. S. § 3709 was enacted for the protection of the Government, and to guide its internal workings; it embodies no purpose to benefit or confer rights on mere bidders.[15] This Court (per Holmes, J.) stated that its requirements are "for the protection of the United States, not of the seller." *American Smelting & Refining Co.* v. *United States*, 259 U. S. 75, 78; *cf. United States* v. *N. Y. & Porto Rico S. S. Co.*, 239 U. S. 88; *McGowan* v. *Parish*, 237 U. S. 285, 294. It is significant that the Act has very rarely been before the courts. Upon the few occa-

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should be animated by a justice as anxious to consider the rights of the bidder as to insist upon its own."

But only by tearing these remarks out of their context do the respondents find support in them. To be sure, a bidder acquires rights when his bid is accepted and ripens into a contract. But it is perfectly clear that no question of the rights of *mere* bidders, much less of *prospective* bidders was before the Court, and that the language quoted above means merely that, under R. S. 3709, after a bid has been accepted and a contract awarded, the bidder has become a contractor and can enforce his contractual rights.

[15] R. S. § 3709 and similar federal statutes have evidently been enacted in order to protect the Government against having to pay excessive prices for its supplies, and against possible fraud or disloyalty of its officers and agents. One of the earliest federal "low-bidder acts" (Act of March 3, 1843, c. 83, 5 Stat. 615, 617, relating to naval provisions and supplies; *cf.* R. S. § 3718) was introduced as an amendment to the Naval Appropriation Act for 1843 immediately after a general discussion in the House of Representatives about mismanagement, or worse, on the part of the then head of the Bureau of Provisions and Clothing of the Navy, and the extravagant prices he paid for supplies. 12 Cong. Globe 374, 376.

sions when R. S. § 3709 (or any similar federal statute) has been before the courts, it has been uniformly held or stated that it gives no standing to bidders to attack the award of contracts.[16] Had it ever been thought that Congress intended that R. S. § 3709 should confer privileges upon mere bidders or prospective bidders to obtain judicial enforcement of its provisions, there would unquestionably have been many instances of recourse to the courts.[17]

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[16] *O'Brien* v. *Carney*, 6 F. Supp. 761 (D. Mass.); *B. F. Cummins Co.* v. *Burleson*, 40 App. D. C. 500; *Champion C. P. Co.* v. *Joint Comm. on Printing*, 47 App. D. C. 141; *cf. Strong* v. *United States*, 6 C. Cls. 135.

[17] In a letter of January 21, 1930, to the chairman of the Subcommittee of the Committee on the Judiciary of the House of Representatives considering one draft of the proposal to establish uniform requirements for Government contracts (H. R. 5568, 71st Cong., 2d Sess.), the Comptroller General recognized that the unsuccessful bidder had no standing to sue in the courts. See Hearings before the Committee on the Judiciary, House of Representatives, 71st Cong., 2d Sess., on H. R. 5568 (Serial 4, Pt. 1), p. 26–27. The interdepartmental board on contracts of the Bureau of the Budget (composed of representatives of the executive departments which purchase and contract) which drew up the various drafts introduced in the 70th and 71st Congresses took the same view. See Hearings, *supra*, at p. 15–22. On the reintroduction of a draft in the 74th Congress, 1st Session (S. 215), the Senate Committee on the Judiciary, in its report (S. Rep. No. 433) indicated its view that there was no judicial review (p. 5–6), although it agreed with the Comptroller General that his office should review the award of contracts.

For the history of this proposal (which has never been carried into effect), see H. Rep. 2863, 71st Cong., 3d Sess.;

The federal "low-bidder act" is paralleled by similar enactments in most of the States, and similar provisions in municipal ordinances and charters. The respondents protest (Br. in Opp., p. 36, n. 14) that these State and municipal enactments differ from R. S. § 3709. This is true, but they differ chiefly in that they customarily provide expressly that public contracts shall be awarded to the "lowest bidder," the "lowest responsible bidder," or the "lowest and best bidder."[18] As has been seen, the federal statute contains no such *express* requirement. Consequently, the State and municipal laws might much more easily be construed to confer rights on bidders than can the federal act, since, unlike the federal act, they contain express directions with respect to the awarding of contracts.

However, the great majority of the decisions under these State and municipal laws are to the effect that unsuccessful bidders have no standing whatever to attack the award of contracts to others, or to compel awards to themselves. Such are the decisions even where it is clearly established that the plaintiff is the lowest bidder, is responsible, and

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S. Rep. 433, 74th Cong., 1st Sess.; Hearings before the Committee on the Judiciary, House of Representatives, 70th Cong., 1st Sess., on H. R. 5767 (Serial 16, Pts. 1 and 2) and on H. R. 15713 (Serial 16, Pt. 3); Hearing before the Committee on the Judiciary, House of Reps., 71st Cong., 2d Sess., on H. R. 5568 (Serial 4, Pts. 1 and 2).

[18] *Infra*, Appendix B, pp. 11–19.

that his bid complies with all the requirements of the statute. Some cases, to be sure, turn on the fact that the award called for the exercise of discretion and judgment by public officers, with which the courts would not interfere.[19] But, even when it is shown that there is no reasonable basis for an officer's failure to award the contract to the plaintiff, or for his awarding it to another, the great weight of authority is that the bidder has no right which has been denied or which provides a standing to seek legal or equitable redress. The statutes are held to be enacted for the benefit of the Government and the public,[20] not for the benefit of bidders, and to confer no rights upon the bidders.[21]

The cases with respect to this proposition are numerous. We have collected and classified them

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[19] Needless to say, such exercise of discretion is called for in the present case. *Infra*, pp. 90–153.

[20] It is, accordingly, generally held that State or municipal taxpayers can compel public officers to comply with these acts, under the principle of *Crampton* v. *Zabriskie*, 101 U. S. 601. But no such action could be maintained against federal officers. *Massachusetts* v. *Mellon*, 262 U. S. 447.

[21] There seems to be no "low-bidder act" tradition in England comparable to that in the United States. The Public Health Act of 1875 requires certain contracts of urban authorities to be let by advertising for tenders. St. 38 & 39 Vict., ch. 55, sec. 174 (4). The Local Government Act of 1933 (St. 23 & 24 Geo. V, ch. 51, sec. 266) makes this requirement of general application. But these provisions have been stated to be directory, not mandatory. *Young & Co.* v. *Mayor & Corp. of Royal Leamington Spa*, L. R. 8 App. Cas. 517 (1883).

in an appendix to this brief.[22] In 12 States—Arkansas, Delaware, Georgia, Iowa, Kentucky, Maryland, Missouri, Montana, North Dakota, Pennsylvania, West Virginia, and Wisconsin—it is definitely established that the State and municipal low-bidder acts, like the federal act, give bidders no standing to attack the award of public contracts. Although not so clearly established, such is probably the rule in 7 additional States—Connecticut, Indiana, Michigan, Minnesota, Mississippi, New York, and Vermont. The contrary rule prevails only in 5 jurisdictions—Hawaii, Louisiana, Nebraska, New Jersey, and Ohio—and perhaps also in Colorado, Illinois, and Washington.

The principle for which we contend is not only established by the great weight of case authority but is also stated to be the proper rule by the commentators.[23]

A leading federal case on this point is *Colorado Paving Co.* v. *Murphy*, 78 Fed. 28 (C. C. A. 8th), the facts of which are strikingly similar to the allegations in the present case. The board of public works of Denver adopted specifications which excluded a certain type of asphalt called "Alcatraz asphalt." The plaintiff, alleging that he was the

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[22] *Infra*, *Appendix B*, pp. 11–19.

[23] High, *Extraordinary Remedies* (3d ed., 1896), § 92; 2 Spelling, *Injunctions and Other Extraordinary Remedies* (2d ed., 1901), § 1553; 2 Dillon, *Municipal Corporations* (5th ed., 1911), § 811, p. 1224; Note (1934), 44 Yale L. J. 149, 152.

lowest reliable and responsible bidder, but that his bid was for Alcatraz asphalt, prayed for an injunction restraining the board from contracting with others, and directing an award to himself. The court found that the "overwhelming weight of the testimony was * * * that Alcatraz asphalt was equal in standard and quality to the accepted asphalts for paving purposes" and the evidence tended strongly to show an agreement between the other bidders which stifled competition.

The Circuit Court of Appeals held that the plaintiff had no right which enabled him to maintain his action, saying (Sanborn, C. J., p. 31–32).

> He is a mere bidder for some of the public work of this city—a contractor, or one who desires to be a contractor. His interest and that of his class, * * * is to get the highest price for their work and materials. It is obvious that the statute was not enacted for their benefit * * *. How, then, can this bidder maintain a suit for their violation? He cannot * * * it is now settled by the great weight of authority that the lowest bidder cannot compel the issue of a writ of mandamus to force the officers of a municipality to enter into a contract with him * * *. This principle is as fatal to a suit in equity as to an action at law. It goes not to defeat any particular cause of action, but to defeat the right to any relief.[24]

[24] Accord: *U. S. Wood Preserving Co.* v. *Sundmaker*, 186 Fed. 678 (C. C. A. 6th); *cf. Noce* v. *Edmund E. Morgan Co., Inc.*, 106 F. (2d) 746, 750 (C. C. A. 8th).

The respondents' attempt to draw support for their suit from R. S. § 3709 leaves them hoist with their own petard, since the decisions under that act and comparable state acts demolish the right which they assert. Undoubtedly, therefore, as they have heretofore, the respondents will attempt to distinguish the cases under "low-bidder acts" from the present case, by attempting to differentiate between the right *to bid* and the right *to obtain an award*.[25] But, as already stated, the petitioners have not denied or obstructed the respondents' right to bid.[26] The respondents may bid, omitting any stipulation to pay the prevailing wages specified in the Secretary of Labor's determination; their bid would be opened, considered, and rejected because it did not contain the stipulation. It is the certainty of rejection of their bid of which the respondents actually complain. But the respondents could not obtain judicial relief, even if the award were illegally rejected, because their legal rights would not have been invaded. No more can they complain because their bids will be rejected if they fail to stipulate to pay prevailing wages as determined by the Secretary of Labor.

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[25] *Cf.* Note (1940), 49 Yale L. J. 548, at pp. 554-56.

[26] There is no need to consider whether, had petitioners actually prevented the respondents from bidding, such action would have given a basis for equitable relief. It was so held under a state statute in *Matter of Weinstein Bldg. Corp.* v. *Scoville*, 141 Misc. 902, 254 N. Y. Supp. 384 (1931). But *cf. Matter of Martin Rooney*, 26 Misc. 73, 56 N. Y. Supp. 483 (1899).

The mere fact that the illegality lies in the determination which governs the award, rather than in the award itself, clearly adds nothing to the respondents' legal rights.

Indeed, respondents' status as mere prospective bidders robs them even of the support of the few decisions (*supra*, p. 39) under state statutes or municipal charters which have accorded actual bidders a right to enjoin unlawful awards to others. And it would seem a shocking conclusion if mere prospective bidders such as the respondents could obtain relief which, by the great weight of authority, unsuccessful bidders whose bids have been unlawfully rejected cannot have. Had the respondents actually submitted bids, and had their bids been the lowest, and sufficient in every respect except for the omission of the prevailing-wage stipulation, surely there would be much more reason for endowing them with a standing to sue than there is in the present case. In such circumstances, respondents would be able to show that they certainly would have received contracts but for the (assertedly) unlawful wage determination. Their damages could be computed. Yet, as we have seen, even in such circumstances, the courts recognize no right to relief. Situated as they in fact are, respondents' "damages" are entirely speculative.[27]

Respondents' effort to distinguish their actual status as *prospective* bidders from a status as

[27] *Matter of Martin Rooney*, 26 Misc. 73, 74; 56 N. Y. Supp. 483 (1899).

unsuccessful bidders leads to absurd results. They complain that they are being prevented from bidding, but that it is not so in fact; they attempt to distinguish cases denying relief to bidders where bids were unlawfully rejected, but, unless they reject the authority of those cases, the respondents are claiming an empty and futile right—to bid and have the bid rejected—which is not in fact being denied them.

2. The Public Contracts Act confers no right upon the respondents which has been invaded

The Public Contracts Act provides a method for determining the contents of one of the specifications to be inserted in invitations for bids to furnish the Government with supplies or services, and the contents of the corresponding stipulations to be inserted in Government contracts. Since, as we have seen, no common-law right of the respondents has been invaded, nor has any right or privilege under R. S. § 3709 been denied them, they cannot complain of the determination (even assuming it to have been illegal) unless the Public Contracts Act itself confers a right to attack the prevailing wage determination.[28]

Unless the Public Contracts Act is intended to benefit others (including the respondents) than the Government, the respondents can claim no right

[28] We show in the next succeeding subsection of our brief (*infra*, pp. 51–60) that the Public Contracts Act contains no *express* grant of a right to judicial review of prevailing wage determinations.

from the Act.[29] In *Di Caprio* v. *N. Y. C. R. R. Co.*, 231 N. Y. 94, 97, 131 N. E. 746, 747 (1921), Andrews, J., stated:

> Where a statutory duty is imposed upon one for the direct benefit or protection of another and the latter is damaged because this duty is not performed a cause of action arises in his favor based upon the statute * * *, but no one not included in the class so directly to be benefited may complain because the statute is not complied with. * * * The rule is not dissimilar to that applicable to provisions said to be unconstitutional.

In support of their asserted *statutory* rights to maintain their action, respondents have heretofore (Br. in Opp., p. 34) relied principally upon *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, *Waite* v. *Macy*, 246 U. S. 606, and *Gegiow* v. *Uhl*, 239 U. S. 3. But these cases establish only that *if* persons have property or statutory rights which are denied or invaded by unauthorized official action, they may under appropriate circum-

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[29] Thayer, *Public Wrong and Private Action* (1914) 27 Harv. L. Rev. 317; Lowndes, *Civil Liability Created by Criminal Legislation* (1932), 16 Minn. L. Rev. 361; Harper, *op. cit. supra*, § 78; Restatement of Torts, §§ 286, 288. See *Owen* v. *Westwood Lumber Co.*, 22 F. (2d) 992 (D. Oreg.) (competing merchant had no standing to sue company maintaining company store in violation of state statute); *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33; *Boronkay* v. *Robinson & Carpenter*, 247 N. Y. 365, 160 N. E. 400 (1928); *Exner* v. *Sherman Power Const. Co.*, 54 F. (2d) 510 (C. C. A. 2d); *cf. Morrison* v. *Work*, 266 U. S. 481, 488.

stances obtain judicial relief. Thus, in the *Magnetic Healing* case, *supra*, the court expressly found that the letters addressed to the plaintiffs (enclosing checks, drafts, money orders, and cash) were the property of the plaintiffs when deposited in the mail for transmission; unauthorized action by the postmaster in retaining and refusing to deliver such letters was held to violate the plaintiff's property rights (187 U. S. 94, at p. 110). Similarly, in *Waite* v. *Macy* and *Gegiow* v. *Uhl*, *supra*, the plaintiffs clearly had the right to import tea, and to remain in the United States, and the challenged official action was held to deny them such rights.[30] But these cases in no way bear on the problem of whether the Public Contracts Act (or any other Act) confers the rights which respondents assert in the present case.[31]

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[30] It is clear that in absence of prohibitory Congressional enactment, immigrants have the right to enter the country. *Cf. Chin Yow* v. *United States*, 208 U. S. 8, 12. Similarly, *Waite* v. *Macy*, *supra*, is distinguishable since in the absence of valid prohibitory legislation, there is a right to import which cannot be denied by customs officials. See *Buttfield* v. *Stranahan*, 192 U. S. 470, 497.

[31] Similarly, respondents' argument that the Public Contracts Act by imposing certain conditions on the "right" to negotiate contracts with Government, establishes a legal right to negotiate contracts if the conditions are complied with (Br. in Opp., pp. 33–34), in no way supports their contention. It is based largely on a statement in *Gegiow* v. *Uhl*, *supra* (Br. in Opp., p. 34 n. 9). Of course *if* there is a statutory right under certain conditions, other conditions cannot be imposed on the exercise of the right. But the mere fact that a statute authorizes official action under cer-

We find no sound, or even plausible, basis for the contention that the Public Contracts Act confers on the respondents any right upon which they may base an attack on the validity of the prevailing wage determination. The Act itself discloses no intention to confer such a right. Its chief purpose, as clearly disclosed in its background and legislative history, was to protect and benefit the public generally.[32] It was enacted shortly after the decision of this Court in *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, which held Title I of the National Industrial Recovery Act unconstitutional. One of the principal purposes of that Act was to increase consumer purchasing power by maintaining wage levels, and thus to stimulate general business recovery. After the decision in the *Schecter* case, Congress felt that the Government should not even indirectly be a party to the anticipated wage cutting, and that the Government's influence as a consumer should be used to maintain wage levels, rather than to depress them. The prin-

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tain circumstances and not others establishes no private rights. Almost every statute for the guidance of official action, whether of a purely "intragovernmental" character or of a regulatory nature, imposes such conditions on officers. But private persons can compel official compliance with such conditions only if their rights are involved, and the conditions alone, obviously, do not grant legally enforceable rights. Statutory intent to protect or benefit the plaintiff must be shown.

[32] The purposes and legislative history of the Act are discussed and analyzed *in extenso*, *infra*, pp. 104–128, and pertinent extracts from the hearings and debates on the bill are set forth in Appendix C, *infra*, pp. 20–56.

cipal object of the Public Contracts Act was to accomplish exactly that result—a result sought in the interest of the purchasing power of wage earners, business recovery, and benefits to the nation as a whole and the public generally. Like R. S. § 3709, accordingly, the purpose is to benefit the general public and not to confer rights on bidders for Government contracts.

Such a policy, obviously, incidentally benefits certain private interests. It benefits manufacturers who maintain wage levels, since it takes away the advantages previously enjoyed by competitors who reduced their wage costs by paying less than prevailing wages.[33] But the respondents complain that the wages determined for their locality are *too high*, not that their competitors' wages have been determined too low. Incidental benefits are likewise extended to employees whose substandard wages are raised,[34] but the petitioners do not stand in their employees' shoes.

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[33] It is immaterial here whether such manufacturers could attack a determination. But, it may be observed, the benefits to them are incidental, and could furnish no basis for such an attack. Nor, under the doctrine of *Alabama Power Co.* v. *Ickes*, and *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, *supra*, would such a suit appear to lie.

[34] Nor need we discuss whether employees have a right under the Public Contracts Act to contest determinations. Here again, the benefits would seem to be incidental. But *cf. Denver Trades Council* v. *Vail*, 103 Col. 364; 86 P. (2d) 267 (1938). It would seem clear, however, that if respondents, whom the statute obviously was *not* intended to benefit, can attack a wage determination, employees also can.

The question of the right to maintain an action, under circumstances substantially identical with those in the present case, was before the Supreme Court of Maryland in *Harlan* v. *Employers' Ass'n of Maryland,* 162 Md. 124, 159 Atl. 267 (1932). That case arose under a Maryland statute (Act of 1910, Code of Public Local Laws, Art. 4, § 516) which provided, *inter alia,* "that not less than the current rate of per diem wages in the locality where the work is performed shall be paid to laborers * * * in any public work within the City of Baltimore." The act imposed penalties for violation of its provisions.[35] The suit was brought against officers of Baltimore by taxpayers, and by contractors who sued as prospective bidders. They alleged that the mayor had appointed a committee to advise him with respect to the "current rate" of wages, that the committee had reported, and that the building engineer of Baltimore had warned all contractors that they would have to comply with the schedule of wages recommended in the report on all public work. Reliance was placed upon a provision of the city charter similar to R. S. § 3709. The plaintiffs prayed that the defendant city officers be restrained from putting the schedule of

[35] The court had previously held the act constitutional, and that it could be enforced only by recourse to the criminal courts, not by injunction. *Ruark* v. *Engineers' Union,* 157 Md. 576, 146 Atl. 797 (1929). See also *Elkan* v. *State,* 122 Md. 642, 90 Atl. 183 (1914), aff'd 239 U. S. 634.

wages into effect, and from requiring contractors and subcontractors to meet the schedule.

The court, holding that the statute was purely penal and did not authorize the city to insert stipulations embodying the wage schedules in its contracts, ruled that such of the plaintiffs as were taxpayers were entitled to maintain the suit. But the court held otherwise as to the contractors and would-be bidders (162 Md., at 132):[36]

> Many contractors join in the bill on the ground that they might not be free to bid with the schedule of wages complained of in the specifications, as a condition precedent to their participating in public work in Baltimore. We do not understand that being engaged in the contracting business as such and that they may be prospective bidders for public contracts qualifies contractors to maintain a suit against the city. It is optional with them whether they bid at all * * * [citing *Campbell* v. *New York*, 244 N. Y. 317, 155 N. E. 628 (1927)], but it is not optional with the taxpayer whether he pays taxes.

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[36] It should be noted that the prospective bidders were in a far better position to complain than the respondents in the present case. The wage determination in the *Harlan* case was entirely without statutory warrant, for there was no statutory basis for *any* wage determination. In the present case, the wage determination was made in pursuance of a statutory mandate, and the respondents can complain only of an alleged misconstruction, admitted to be made in good faith.

The respondents attempt to spell out some sort of right to be free from the sharpened competition from their competitors, which the respondents fear will result if they have to pay the determined wages in order to bid. There can be no contention that there is a statutory basis for any such right, and we have shown that this is not a right recognized by the common law.[27]

The *Alabama Power Co.* case and the other cases in the same line of authority show that it is highly unlikely that Congress intended the Public Contracts Act to confer the right which the respondents assert. The wage determination does not prevent the respondents from bidding, and it does not prevent them from receiving contracts if they stipulate to pay the prevailing wages as determined. The only injury which respondents complain of if they do comply with the determination is the sharpened competition from competitors. This, as the cases show, has always been considered too slight to ground a cause of action. It is beyond all likelihood that Congress intended to create a new right of the sort the respondents claim under

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[27] *Supra*, p. 29. See *Alabama Power Co.* v. *Ickes*, *supra*; *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, *supra*; *Louisiana* v. *McAdoo*, *supra*; *Edward Hines Trustees* v. *United States*, *supra*; *Sprunt & Son* v. *United States*, *supra*; see *United States ex rel. New York Warehousing Ass'n* v. *Dern*, 68 F. (2d) 773 (App. D. C.), certiorari denied, 292 U. S. 642; *Milwaukee Horse & Cow Comm. Co.* v. *Hill*, 207 Wis. 420, 241 N. W. 364 (1932); *cf. Railroad Co.* v. *Ellerman*, 105 U. S. 166; *Chicago Junction Case*, 264 U. S. 258.

the Public Contracts Act, the objectives of which were in the interest of the general public, and none of the incidental benefits of which extend to the respondents.

3. The Public Contracts Act does not provide for judicial review of wage determination

The respondents have suggested that Section 5 of the Public Contracts Act expressly contemplates judicial review of prevailing wage determinations (Br. in Opp. p. 39 n. 22). The suggestion is based on a wholly distorted analysis of Section 5 and its place in the scheme of the statute.[38]

Congress can, of course, constitutionally foreclose judicial review of administrative decisions on matters concerning contracts with the United States. *United States* v. *Babcock*, 250 U. S. 328; *Work* v. *Rives*, 267 U. S. 175; *Butte, Anaconda & Pac. Ry. Co.* v. *United States*, 290 U. S. 127; *Great Northern Ry. Co.* v. *United States*, 277 U. S. 172, 182. Judicial review of the prevailing wage determinations would be highly inappropriate, and nothing in the Public Contracts Act or its history suggests that Congress intended the determination to be reviewable.

Section 5 of the Public Contracts Act, upon which the respondents rely, is set out in the

[38] Although elaborately briefed in the court below, neither the majority nor the minority opinion of the Court of Appeals commented on this argument.

margin.[39] It will be observed that one clause states that "findings of fact" if "supported by the preponderance of the evidence, shall be conclusive in any court of the United States." The section is very inartistically drawn; the clause in question is

[39] SEC. 5. Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of this Act, and on complaint of a breach or violation of any representation or stipulation as herein provided, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, failure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act.

so placed that it seems to confer powers upon the District Courts to make findings, but it is obvious that in fact the clause (together with the succeeding clauses) refers back to, and should have been added to, the first sentence of the section granting powers to the Secretary of Labor. So much is not disputed by the respondents, as they read the clause in question as applicable to the Secretary of Labor. However, the respondents contend that, by virtue of this clause the Secretary's wage *determinations* are reviewable, whereas in fact it is plain that only the Secretary's *decisions* with respect to breaches and violations of the stipulations required by Section 1 of the Act are reviewable.

Quite plainly, Section 5 is not designed to *confer* a right to review, but is directed simply to action of the Secretary which would affect contractual rights for which the Tucker Act provides an existing remedy. Textually, it offers no support for respondents' views. Reference is made in the final clause only to "decisions" which the Secretary is authorized to make to enforce the provisions of the Act, while the Act consistently refers to wage determinations as "determinations" (Sections 1, 11). "Decisions," "based upon findings of fact," which are "necessary to enforce the provisions of this Act" are adjudications that there have been violations of the stipulations imposed by Section 1. Such decisions are "quasi-judicial" in nature, since they impose directly upon the persons adjudged

guilty the liabilities for liquidated damages provided by Sections 2 and 3.

The first sentence of the section, to which the clause in question relates, is construed by the respondents as granting the Secretary power to hold hearings and make judicially reviewable findings (1) upon his own motion, or (2) on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of the Act, *or* (rather than the textual *and*) (3) on complaint of a breach or violation of any representation or stipulation. But it is plain that "and" was used advisedly, for the word was changed in Congress from "or" to "and."[40] Furthermore, it is apparent that (2) and (3) can have no application to wage-determination hearings. Accordingly, respondents must contend that while (2) and (3) refer only to the quasi-judicial functions of the Secretary, (1), which is linked in conjunction with them, refers both to his quasi-judicial and his quasi-legislative functions. No reason can be assigned for so scrambled an interpretation.

To read Section 5 to apply to wage determinations is to make the penultimate sentence of Section 4 surplusage. That sentence reads:

> The Secretary of Labor or his authorized representatives shall have power to make in-

[40] The word "or" appeared in Section 7 of H. R. 11554 (74th Cong., 2d Sess.), which was the progenitor of Section 5 of the Act.

> vestigations and findings as herein provided, and prosecute any inquiry necessary to his functions in any part of the United States.

If Section 5 is applicable also to the wage determinations under Section 4, this important portion of the preceding section is wholly without function. Doubly so, since Section 5 contains its own grant of corresponding power in similar terms.

Nor can it be said that the provisions of Section 4 empowering the Secretary to make findings and investigations "as herein provided" mean findings and investigations "as provided in Section 5." The reference is obviously to the investigation and findings necessary to *administer*, the provisions of Sections 1 and 6. The last portion of Section 5 grants authority, "as herein provided," to make investigations, findings, and decisions to *enforce* Sections 2 and 3. The Act thus preserves the dichotomy between the provisions granting quasi-legislative and those granting quasi-judicial powers to the Secretary. The former he is authorized to "administer," the latter to "enforce."[41]

The first attempt by Congress to regulate the wages paid to employees of public contractors was the Act of March 3, 1931, c. 411, § 1, 46 Stat. 1494 (the first Davis-Bacon Act) relating to wages paid

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[41] Section 5 can certainly not be read to cover the applications for exceptions, modifications, and tolerances provided in Section 6. But if the provisions of Section 5 relates to wage determinations, there is no reason for different treatment of the findings and determinations called for under Section 6.

in the construction of public buildings. It provided that the prevailing rate of wages was to be determined by agreement between the contracting officer and the contractor after the contract had been made. In case of dispute, the Secretary of Labor was to make the determination which was to be final and conclusive upon all the parties. The recent case of *Gillioz* v. *Webb,* 99 F. (2d) 585 (C. C. A. 5th), has held the Secretary's determination similar to that of an appraiser or valuer, "a part of the process fixed by the contract for determining a price, or an amount to be paid," and subject to impeachment only for "fraud, dishonesty, or bad faith." See also *United States for the use of Boucher* v. *Murphy,* 11 F. Supp. 572 (W. D. Mich.).

Constant complaints that the determination of the wages during the course of the performance of the contract led to injustices and perhaps to collusion between contracting officers and the contractors [42] led Congress to amend the Act in 1935 to provide for predetermination of the wage rates prior to the issuing of invitations to bid. Act of Aug. 30, 1935, c. 825, § 1, 49 Stat. 1011, 40 U. S. C. §§ 276a *et seq.*[43] There is nothing whatever in the

[42] See S. Rept. 332, 74th Cong., 1st Sess., the report of the Subcommittee of the Senate Committee on Education and Labor appointed to investigate into relationships between employees and contractors in public works.

[43] A similar bill providing for predetermination (S. 3847, 72d Cong., 1st Sess.) was vetoed by President Hoover on June 30, 1932.

legislative history of the amendment to indicate that the Congress intended to lessen in any way the binding character of the Secretary's decisions." The Act itself contains no provision for any judicial review.

The Public Contracts Act was considered by Congress to be an extension of the theory of the Davis-Bacon Act (as amended) into new fields, with certain very important changes.[45] The later Act is modeled closely after the earlier one, with respect to the adoption of predetermination of wages, and the absence of any provisions for judicial review of the determinations. It is proper to assume that Congress carried over into the new statute its desire that the determination of prevailing wages be entirely free from review. This is borne out by the legislative history of the Public Contracts Act itself. There is hardly a suggestion in any of the three sets of hearings held by Senate and House

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[44] In the discussion in the House on S. 3847 (72d Cong., 1st Sess.) (vetoed by the President), Representative Connery, chairman of the sponsoring committee, stated that "The Secretary of Labor is the final arbiter." 75 Cong. Rec. 12377. Opponents of the measure complained that the determination rested entirely with the Secretary. 75 Cong. Rec. 12365, 12375. The veto did not go on this ground. 75 Cong. Rec. 14589, S. Doc. 134 (72d Cong., 1st Sess.). S. Rept. No. 332 (74th Cong., 1st Sess.), *supra*, note 42, which was a prime factor in inducing the 1935 Act, discusses elaborately the defects in the 1931 Act and proposals for amendment (which were later adopted), but does not even cast doubt on the conclusiveness of the determination.

[45] *Infra*, pp. 112–115.

committees [46] that judicial review of the wage determinations was implied in the bills being considered. On the other hand, just as in the case of the Davis-Bacon Act, many complaints were voiced by opponents of the bill that uncontrolled power was being granted to administrative officials.[47] It is significant that, in answer to these arguments, no reference was made to the corrective powers of the courts; the countervailing contentions were merely that the Secretary of Labor would be fair and would follow the standards laid down, and that it was necessary to grant the power.[48] The course of the bill through Congress reveals the same history; complaints by opponents of the "dictatorial" powers given to the Secretary [49] with respect to wage determinations met with no references to judicial review by the bill's advo-

[46] Hearings before the Committee on Education and Labor, U. S. Senate, 74th Cong., 1st Sess., on S. 3055; Hearings before the Committee on the Judiciary, House of Representatives, 74th Cong., 1st Sess., on S. 3055 (Serial 12, Part 1); Hearings before a subcommittee of the Committee on the Judiciary, House of Representatives, 74th Cong., 2d Sess., on H. R. 11554 (Serial 12, Part 2).

[47] Hearings on H. R. 11554, *supra*, pp. 216 (Secretary "absolute dictator"), 251, 253–257, 264–265, 274, 299, 307, 311, 328, 371, 410, 425, 459, 487.

[48] Hearings on H. R. 11554, *supra*, pp. 216, 218–219, 260, 285, 375; *cf.* Hearings on S. 3055, House of Reps., pp. 114–115.

[49] 80 Cong. Rec. 10003–10004, 10006, 10007, 10019. These remarks were made during the consideration of the amendment providing for the determination of "prevailing minimum wages." See also 79 Cong. Rec. 12896.

cates.[50] This is particularly significant, since Senator Walsh, the sponsor of the Act in the Senate, was quick to mention judicial correction of errors made by administrative officials in imposing penalties for violation of the stipulations contained in his contract.[51]

There is nothing in the legislative history of Section 5 itself to indicate that it was intended to apply to the quasi-legislative determinations of wages. It seems to have been inserted to insure to contractors asserted to have breached the stipulations required by the Act and subject to its penalties, a quasi-judicial hearing.[52] The substitution of support by "the preponderance" of the evidence for support by "the evidence," to make findings of fact under Section 5 conclusive in the courts, is quite consistent with the view that the section applies to adjudications of violations, after which follow the penalties authorized by Sections 2 and 3. But it is obviously wholly contrary to the uniform Congressional trend with respect to the weight to be given to quasi-legislative findings of administrative agencies.

Finally, it should be noted that it would be inappropriate to read into the Public Contracts Act

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[50] Sen. Rep. 1157, 1193, 74th Cong., 1st Sess.; H. Rep. 2946, 74th Cong., 2d Sess.; 79 Cong. Rec. 12074, 12245, 12716, 12718, 12726, 12730, 12774, 12780, 12791, 12794, 12876, 12883-12896; 80 Cong. Rec. 10001-10026, 10201, 10537.

[51] 79 Cong. Rec. 12723.

[52] Senator Walsh's interest in this type of protection is clear from the debates, 79 Cong. Rec. 12723.

judicial reviewability of wage determinations. *Butte, Anaconda & Pac. Ry. Co.* v. *United States*, 290 U. S. 127; *Work* v. *Rives*, 267 U. S. 175. As in the two cases cited, the present case concerns the strictly nonregulatory functions of Government. This fact sharply distinguishes it from *Shields* v. *Utah Idaho Central R. R. Co.*, 305 U. S. 177, where the determination of the Interstate Commerce Commission was part of a "regulatory scheme." Judicial review, accordingly, was appropriate, even though not specified in the statute.

D. THE RESULT OF PERMITTING RESPONDENTS TO MAINTAIN THIS ACTION WOULD BE SERIOUSLY OBSTRUCTIVE TO NONREGULATORY GOVERNMENT ACTIVITIES WHICH ARE NECESSARY TO ITS GENERAL FUNCTIONING

In the previous subdivisions of this part of our brief, we have taken up, one by one, the various bases upon which the respondents attempt to ground their right to bring this action. There are highly important practical considerations bearing on the respondents' standing to sue which affect equally all of the sources from which they seek to derive rights. While respondents phrase their right as a right "to bid and negotiate for Government contracts free from unauthorized conditions," it has been shown that *in fact* they are claiming a right to judicial review of the award of Government contracts; their right merely to bid free from allegedly unlawful conditions is empty unless they can free the awarding from such conditions, and, in any case, their right to bid on whatever basis

they choose has not been denied them. As we will show in this section of our brief, the results of permitting actual bidders or prospective bidders to obtain judicial review of the process of awarding Government contracts would be very disturbing to these nonregulatory, purely proprietary, Government purchasing and contracting activities. These activities, underlying and essential to all Government functioning, can even less appropriately than disbursements of Government funds be subjected to judicial review. Cf. *Massachusetts* v. *Mellon*, 262 U. S. 447.

The Government, in the course of the performance of its various functions, must enter into innumerable contracts for services and supplies[53] and it requires no detailed exposition to demonstrate that, should the power of contracting officers expeditiously to acquire supplies be curtailed, practically every function of the Government would be seriously hampered or crippled.[54]

By a number of statutes Congress has blocked out the broad outline of policies which are to be

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[53] There are filed in the General Accounting Office over a million Government contracts each fiscal year. Annual Report of the Comptroller General for the Fiscal Year ended June 30, 1939, p. 28.

[54] Revised Statutes 3735 (41 U. S. C. § 13) limits contracts for supplies for the departments to one year. It is clear that the Government requires an evenly flowing stream of supplies if it is to function smoothly. Often it is necessary that materials be furnished on a regular schedule and a delay in the procurement of some relatively insignificant article may throw an entire program out of schedule.

followed in the performance of Government contracts, and has placed the duty upon Government officers to carry these policies into effect. For example, in the Public Contracts Act, here under discussion, it is necessary for the contracting officer to determine that the contract in question is in an amount of $10,000 or over, and that it calls for an article which is subject to the provisions of the Act. The Davis-Bacon Act, as amended, c. 825, 49 Stat. 1011, 40 U. S. C. § 276a, necessitates the determination of the prevailing wages where construction contracts are involved. It is also necessary to determine that the contract in question is primarily a construction contract, and not one involving materials and supplies to which the Public Contracts Act is applicable. The "Eight-Hour Day" Act of June 19, 1912, c. 174, 37 Stat. 137 (40 U. S. C. 324, 325), provides that there be included in certain types of contracts a provision that no workman should be employed more than eight hours in one calendar day. There are certain exceptions to the "Eight-Hour Day" Act, such as those relating to articles which may be purchased in the open market. The contracting officer is compelled to interpret the law when he decides as to whether the article contracted for falls within an exception to the Act. The "Buy American" Act of March 3, 1933, c. 212, Title III, 47 Stat. 1520 (41 U. S. C. 10 (a)), provides for the use of articles produced in the United States in the performance of Government contracts unless the head of the department concerned shall determine the use of such articles

to be incompatible with the public interest because the same are not manufactured or produced in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or that such purchase would unreasonably increase the cost. Here again, the discretion of governmental officials must be exercised. Many close decisions must necessarily be made and it cannot be assumed that in every instance a contracting officer reaches the same conclusion as would a disappointed bidder or as would a court. That reasonable persons may disagree as to the legality of the action of a contracting officer is evidenced by the number of instances in which unsuccessful bidders have vigorously protested the action of contracting officers and also by the number of instances in which the decisions of such officers have been overruled on administrative appeal (*infra*, p. 66, n. 56).

There are also many provisions frequently placed in Government contracts or specifications for the insertion of which no express statutory authority exists. These provisions require, *inter alia*, that the Government will receive the benefit of any general price reduction; that the contractor will not advertise the fact that he has a contract with the United States unless he states the specific items covered by the contract; that he agrees to inspection and tests of his products as a condition precedent to having his bid considered; that he is precluded from furnishing a substitute for the

article contracted for. Other provisions in the invitation to bid frequently exclude potential bidders who might otherwise qualify. Typical of these are invitations to bid where several items are listed and the award is made for the aggregate of such items and the prospective bidder cannot produce one of the items; where the contractor's plant is so situated that he cannot meet the time schedule of deliveries; where the specified manner of packing and packaging is so materially different from that ordinarily employed by him that he could not comply with such provision; and where a performance bond is required in an amount which he is unable to furnish. It is, of course, obvious that if any of these requirements, considered in conjunction with a specific contract, violate any of the statutes regulating Government contracts, the contracting officer is not acting in accordance with law, and is exceeding the discretionary power which ordinarily might be conceded to be vested in him.'

R. S. § 3709 is a frequent source of legal problems and difficulties. Questions constantly arise within the departments as to who is the lowest responsible bidder, and as to whether the specifications have been fairly drawn.[55] The procedure followed at the

[55] It is constantly being asserted that specifications are so drawn as to preclude a specific potential bidder who maintains that his product would serve equally well as the article specified, or where the potential bidder maintains that the specifications, in effect, unnecessarily require a proprietary article, or are otherwise unduly restrictive, See, e. g., Cf. *Colorado Paving Co.* v. *Murphy*, *supra*, p. 40.

present time, whether it involves an unsuccessful bidder or one dissatisfied with the narrowness of the specifications, is exclusively administrative. It involves either an appeal to the department concerned in order that the specifications may be modified, or the award reconsidered, or an appeal to the Comptroller General, who thereupon investigates the matter.[56] See, e. g., 38 Op. A. G. 555 (1937); 14 Comp. Gen. 518 (specifications for a motor truck, requiring that spare tire be placed in fender well, violate R. S. § 3709); 15 Comp. Gen. 974 ("de luxe" auto specifications, specifying built-in trunk, safety glass, etc., violate R. S. § 3709); 15 Comp. Gen. 1023 (bids for overhauling airplane engines can not be restricted to the manufacturer and companies approved by the Bureau of Air Commerce); 5 Comp. Gen. 776.

The decision of the court below stands for the proposition that an actual or a prospective bidder may maintain a suit against a Government con-

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[56] While the Comptroller General has no specific authority in this regard, his power to disallow the accounts of a disbursing officer results in his recommendations being almost universally followed. We are advised that an expeditious determination is reached in this manner as the majority of the complaints are in respect of R. S. § 3709, and are disposed of within two to four weeks from the time they are filed with the General Accounting Office. See Appendix E, *infra*, pp. 65–66, summarizing the instances during a single year wherein the Comptroller General was called on for an advance opinion with respect to the legality of specification or awards.

tracting officer enjoining the inclusion of certain provisions in the specifications for a contract, or enjoining the awarding of the contract upon the basis of such provisions in the specifications, upon the ground that the specifications are invalid, or that the contracting officer's action in awarding the contract was illegal, or arbitrary and capricious. It is not surprising that the great majority of the decisions (*supra*, pp. 36–41) recognize no right to maintain such an action.

To recognize a right of bidders, actual or prospective, to obtain judicial review of such questions will invite an unlimited number of suits by disappointed bidders or would-be bidders, claiming that the specifications were illegally or arbitrarily established or favored one group of bidders or another, or that the award of a contract is invalid for like or other reasons. The multitude and complexity of the factual, legal, and discretionary problems which the courts would have to scrutinize are apparent. Such considerations are highly appropriate in deciding whether the right asserted by the respondents should now be recognized, and in determining the propriety or impropriety of judicial review. Cf. *Louisiana* v. *McAdoo*, 234 U. S. 627, 631–32; *United States* v. *Nat. Surety Corp.*, No. 236, this Term.

The probable effect of recognizing the right respondents assert upon the ordinary, basic, and nonregulatory contracting activities of the Gov-

ernment is equally clear.[57] If the right is held to exist, the letting of public contracts for essential Government services and supplies is likely to be delayed, hindered, and obstructed by suits to enjoin the inclusion of particular provisions in specifications or to enjoin awards. No such right has ever been recognized under existing federal law; it would be remarkable if it should be held that the Public Contracts Act has brought such a right into existence.[58] Certainly no intention to create such a

[57] *Cf. Bancamerica-Blair Corp.* v. *State Highway Com.*, 265 Ky. 100, 95 S. W. (2d) 1068 (1936); *Riker* v. *Oakland Circuit Judge*, 138 Mich. 181, 101 N. W. 229 (1904); *M'Cafferty* v. *Glazier*, 10 How. Prac. 475 (N. Y. 1854).

[58] A number of the states have passed statutes analogous to the Public Contracts Act and the Davis-Bacon Act. Only one of them out of fourteen provides for judicial review of prevailing wage determinations. Ariz. Rev. Code (Supp. 1936), c. 63–A, §§ 2755b to 2755 (no judicial review); Cal. Labor Code (1937), §§ 1770–1781 (no judicial review); Col. Stats. Anno. (1935), c. 97, § 257 (decision of the industrial commission "conclusive on all parties"); Conn. Gen. Stats. (Supp. 1939), § 793e (no judicial review); Del. Rev. Code (1935), § 3650 (no judicial review); Fla. Comp. Gen. Laws (Permanent Cum. Supp.), § 1365 (5) (no judicial review); Ind. Stats. Ann. (Burns), §§ 53–301 to 53–305 (no judicial review); Mass. Gen. Laws, c. 149, §§ 26, 27, 27A (probably no judicial review, but *cf.* c. 149, § 9); N. J. Rev. Stats. (1937), §§ 34:10–1, 34:11–1 (no judicial review); N. Mex. Laws of 1937, c. 179 (no judicial review); N. Y. Labor Law, § 220 (8) (expressly subject to judicial review); Ohio Gen. Code (Page), §§ 17–3 to 17–6 (no judicial review); Tex. Ann. Stats. (Vernon), art. 5159A (no judicial review); Utah Rev. Stats. (Supp. 1939), § 76B–O–1 (no judicial review).

right can be imputed to Congress in the absence of a clear and compelling manifestation of such intent.[59]

With respect to the delay and obstruction of Government business, no distinction can be drawn between suits by prospective bidders to set aside specifications (as in the instant case) and suits by unsuccessful bidders to enjoin awards of contracts.[60] A challenge directed against specifications would be fully as obstructive as the latter type. Such a challenge makes it necessary for the Government to determine whether new specifications, not open to objection, could be framed which would accomplish the desired purpose, or whether to delay procuring the supplies or services until after the outcome of litigation, or whether the necessity for speedy procurement dictates a surrender to the challenge and abandonment of the purpose which the allegedly objectionable specifications were intended to achieve. In the instant case, the Government felt obliged to adopt the third course. Contracts for iron and steel products have been

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[59] In one instance, Congress has specifically authorized judicial review of the award of contracts. Act of July 2, 1926, c. 721, 44 Stat. 780, 788–89 (award of contracts for aircraft, etc., to lowest responsible bidder). Under well-settled principles, this express provision for judicial review with respect to a particular class of contracts negatives review with respect to contracts generally.

[60] The respondents suggest by implication such a distinction (Br. in Opp., pp. 4–5). *Cf.* Note (1940), 49 Yale L. J. 548, 555–56.

advertised and let without incorporating the enjoined prevailing-wage specifications, because the necessity for prompt procurement outweighed all other considerations.[a]

It is as necessary for the Government to buy and to contract as it is for the Government to tax. The ordinary functions of the Government, to say nothing of the needs for national defense, cannot be carried on without buildings, furnishings, and supplies. The purchasing and contracting activities of the Government are in no sense regulatory in character and do not subject individuals or private interests to any restraint. It would be an entirely novel principle, and a serious threat to the efficient and flexible functioning of the Government, if the courts should undertake to interfere with or control the Government's purchasing activities. If a single disgruntled merchant, dissatisfied with regulations governing eligibility to

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[a] The respondents' argument (Br. in Opp., pp. 4–5, notes 5 and 6) that the present proceeding has not obstructed the Government's contracting activities is obviously fallacious. Of course, the injunction has not *prevented* such activities, because the necessity for procuring steel products is so compelling that contracts are being let *without* the specifications and stipulations which have been enjoined. Clearly the fact that the Government has bought steel in greater quantities, since the injunction was issued than theretofore is utterly irrelevant, as is the circumstance that the prevailing wage determination at first (prior to the issuance of the injunction) diminished competition because many potential bidders were challenging it, and consequently there were fewer bidders.

bid or to obtain an award, may, by invoking the aid of the courts, tie up or hamper the purchasing activities of the Government, the consequences are likely to be far-reaching and serious. The respondents' standing to sue must, therefore, be denied on the familiar grounds stated by Chief Justice Taney in *Decatur* v. *Paulding*, 14 Pet. 497, 516:

> The interference of the courts with the performance of the ordinary duties of the executive departments of the Government, would be productive of nothing but mischief; and we are quite satisfied, that such a power was never intended to be given to them.

Compare *Keim* v. *United States*, 177 U. S. 290, 292–293, 296; *Dakota Cent. Tel. Co.* v. *South Dakota*, 250 U. S. 163, 184.

II

THIS SUIT IS AGAINST THE UNITED STATES, WHICH HAS NOT CONSENTED TO BE SUED

It is axiomatic that the United States cannot, without its consent, be sued in any court. It is equally well settled that whether the suit is against the United States turns upon the substantial effect of the decree and not the presence of the United States as a formal party to the action. *Minnesota* v. *Hitchcock*, 185 U. S. 373, 386; *Louisiana* v. *McAdoo*, 234 U. S. 627; *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, 296.

From these undisputed premises it would seem naturally to follow that this action, directed against

six heads and three other high officials of departments of the United States, in their official capacity as well as individually, transgresses the immunity of the Government of which they are officers. To this proposition the respondents, and the court below (R. 395–7), find a ready answer in the allegations of the bill of complaint that the petitioners have exceeded, or intend to exceed, the authority granted to them by the Public Contracts Act. It is argued that the sovereign's immunity has never been allowed to shield an official who has acted contrary to his statutory or constitutional authority. Such an official, it is insisted, is sued as a private wrongdoer invading recognized rights and is unable to justify his actions by recourse to authority validly conferred.

The long history of suits against the United States and its officers shows with abundant clarity that neither of the simple analyses suggested in the preceding paragraph can be accepted without more. In the following pages we advance those principles which seem most nearly to rationalize the not wholly consistent decisions in this field.

In brief, we urge: (a) The officer cannot be sued unless he has exceeded his authority, but that alone does not establish that the suit is not against the Government. (b) A suit to compel performance of Government contracts, or to strip the Government of title to or possession of property, is one against the United States regardless of the officer's authority. (c) So, too, any suit which obstructs

the general activities of the Government, beyond the action challenged by the plaintiff, is one against the United States. (d) But a suit which seeks to restrain an unauthorized *regulation* by an officer, or which does not seek a determination of title to or possession of property binding against the United States, is a suit not against the Government but only against the officer who has exceeded his authority.

A. THE ALLEGATION THAT THE PETITIONERS ARE ACTING BEYOND THEIR STATUTORY AUTHORITY DOES NOT DISPOSE OF THE QUESTION OF SUIT AGAINST THE UNITED STATES

It is clear enough that unless the officer acts in excess of his statutory or constitutional authority, he cannot be sued at all. *Yearsley* v. *Ross Construction Co.*, No. 156, this Term. It seems equally clear that satisfaction of this condition precedent to the suit is not determinative of the further question of whether the suit is in substantial effect one against the United States. Many suits against officials to undo action alleged to be in excess of their authority have been recognized to be in reality directed against the United States or a State.[82]

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[82] *Louisiana* v. *McAdoo*, 234 U. S. 627; *Goldberg* v. *Daniels*, 231 U. S. 218; *Morrison* v. *Work*, 266 U. S. 481; *Louisiana* v. *Garfield*, 211 U. S. 70; *New Mexico* v. *Lane*, 243 U. S. 52; *Oregon* v. *Hitchcock*, 202 U. S. 60; *Nagano* v. *Hitchcock*, 202 U. S. 473; *Lankford* v. *Platte Iron Works*, 235 U. S. 461; *Louisiana* v. *Jumel*, 107 U. S. 711; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446; *Boeing Air Transport, Inc.*, v. *Farley*, 75 F. (2d) 765 (App. D. C.),

In *Louisiana* v. *McAdoo*, 234 U. S. 627, the Secretary of the Treasury was charged with illegally, arbitrarily, and unjustly imposing too low a tariff on Cuban sugar, contrary to the applicable statutes. The plaintiff in *Goldberg* v. *Daniels*, 231 U. S. 218, alleged that the Secretary of the Navy was refusing, in direct contravention of the statute, to deliver a vessel purchased by him. *Morrison* v. *Work*, 266 U. S. 481, involved claims that certain statutes under which defendants were purporting to act were unconstitutional, and further claims that the defendants in any event were exceeding their granted authority. In *Oregon* v. *Hitchcock*, 202 U. S. 60, the Secretary of the Interior was asserted to have acted under a misconstruction of statutes of Congress relating to lands allotted to the state, and in *Naganab* v. *Hitchcock*, 202 U. S. 473, he was said to be acting under an act unconstitutionally depriving the plaintiff of his property without due compensation.

In these illustrative cases, as well as in the others cited, the official against whom the proceeding was brought was alleged to be acting illegally, yet, in each case, the plaintiff's suit was barred by the immunity of the United States from suit. It seems clear that something more than a charge that the officer is acting in excess of his authority is needed to maintain the suit. This further question must

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certiorari denied, 294 U. S. 728; *Transcontinental & Western Air, Inc.*, v. *Farley*, 71 F. (2d) 288 (C. C. A. 2d), certiorari denied, 293 U. S. 603.

be answered in terms of the relief sought. As the Court said in *Cramp & Sons* v. *Int. Curtis Marine Turbine Co.*, 246 U. S. 28, 40:

> the right to proceed against an individual, even although an officer, to prevent a violation of the Constitution did not include the right to disregard the Constitution by awarding relief which could not rightfully be granted without impleading the United States, or, what is equivalent thereto, without interfering with the property of the United States possessed or used for the purpose of its governmental functions.

The succeeding sections of this point explore the types of relief prayed which have been held to contemplate a suit against the United States and those which have been held to be directed at the individual officer alone. From that analysis it seems plain that the present suit is directed against the Government, not the petitioners alone.

B. A SUIT SEEKING TO CONTROL THE TERMS OF PERFORMANCE OF GOVERNMENT CONTRACTS OR SETTLING THE TITLE OR ENJOYMENT OF GOVERNMENT PROPERTY IS BROUGHT AGAINST THE SOVEREIGN

1. The contracts from which respondents would delete, by judicial action, the clauses relating to minimum wages will be contracts of the United States, and of the United States alone. In setting the specifications and terms, and in entering into the agreements, the petitioners will secure no private interests of their own; they will act solely in their official capacity—as the complaint itself

many times recognizes—and on behalf of the Government alone.

The direct and immediate effect of granting the relief sought by respondents has been, and will continue to be, to fix the terms and conditions of Government contracts. This effect is neither collateral nor accidental, but it is the very thing sought by the respondents. Regardless of the legality of the Acting Secretary's determination, the Court can sanction the relief granted below only by approval of an interference with the formation and content of contracts of the United States. But it is settled that, without the consent of Congress, there can be no such interference.

If the concept of "suit against the United States" is to have any content in cases where the United States is not formally a party, surely those proceedings in which control over the terms of government contracts (or the enjoyment of government property) is asked fall well within its boundaries. Such, certainly, is the teaching of the decisions.

It is uniformly held that a suit for an injunction or mandamus specifically to enforce a contract of the United States or of a state transgresses the immunity from suit.[63] It is immaterial that in re-

[63] *Wells* v. *Roper*, 246 U. S. 335; *Ex parte State of New York*, 256 U. S. 490, 500; *Louisiana* v. *Jumel*, 107 U. S. 711; *In re Ayers*, 123 U. S. 443, 502–503 (see *Ex parte Young*, 209 U. S. 123, 151–152–189); *Goldberg* v. *Daniels*, 231 U. S. 218; *Transcontinental & Western Air, Inc.* v. *Farley*, 71 F. (2d)

fusing to perform the contract the official sued may be acting contrary to statute or the constitution.[64] This is so because, regardless of the extent to which the defendant may be exceeding his valid authority, it is the United States or the state which would have to perform the contract and carry on the activities which will fulfill its terms.

Here, too, it is only the United States, and not the individual petitioners, which is in fact affected by the injunction. It is the contracts of the United States, not of the petitioners, from which the minimum wage terms will be excised. This incontestable fact is, of course, recognized by the respondents who, at the same time that they strenuously maintain that the petitioners are to be treated as private individuals, proceed against them in their official capacity (R. 2, 9–12, 38–44) and ask that contracts of the United States be freed from the requirements to which they object (R. 38–44). It is pertinent to recall the many decisions, holding proceedings to be against the sovereign, which

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288 (C. C. A. 2d), certiorari denied, 293 U. S. 603; *United States ex rel. Shoshone Irr. Dist.* v. *Ickes*, 70 F. (2d) 771 (App. D. C.), certiorari denied, 293 U. S. 571; *Johnstown Coal & Coke Co.* v. *Wilson*, 60 F. (2d) 557 (E. D. N. Y.); *Plain* v. *Horne*, 196 Fed. 582 (Idaho); see *Hopkins* v. *Clemson College*, 221 U. S. 636, 642.

[64] *Louisiana* v. *Jumel*, 107 U. S. 711; *Goldberg* v. *Daniels*, 231 U. S. 218; *In re Ayres*, 123 U. S. 443; *Transcontinental & Western Air, Inc.* v. *Farley*, 71 F. (2d) 288 (C. C. A. 2d), certiorari denied, 293 U. S. 603; *Boeing Air Transport, Inc.* v. *Farley*, 75 F. (2d) 765 (App. D. C.), certiorari denied, 294 U. S. 728.

stress the official character with which the plaintiffs must of necessity endow the defendants in order to secure relief. *Louisiana* v. *Jumel*, 107 U. S. 711; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446; *Belknap* v. *Schild*, 161 U. S. 10; *Wells* v. *Roper*, 246 U. S. 335.

The same logic, it may be observed, has prevailed in a number of the cases which have held suits by an allegedly lowest responsible bidder to set aside the award of a public contract to a competitor to be suits against the state.[65]

Thus, under settled principles, the present suit must be dismissed as one brought against the United States, in that it seeks to control the terms and performance of contracts with the Government.

2. For the sake of completeness of analysis, it may be appropriate to point out a cognate type of relief the prayer for which converts a suit nominally against an officer into one against the United States. This class of actions, equally obviously directed against the Government, is that in which the relief granted or sought will finally determine or interfere with the title, possession, or use of government property.[66]

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[65] *Johnstown Coal & Coke Co.* v. *Wilson*, 60 F. (2d) 557 (E. D. N. Y.); *Peoples* v. *Byrd*, 98 Ga. 688, 25 S. E. 677 (1896); *Herald Pub. Co.* v. *Klamath Falls Pub. Co.*, 116 Ore. 62, 240 Pac. 244 (1925); *Mills Publishing Co.* v. *Larrabee*, 78 Iowa 97, 42 N. W. 593 (1889); see *Butler* v. *Printing Commission*, 68 W. Va. 493, 497, 70 S. E. 119, 121 (1911).

[66] A United States official cannot be enjoined from infringing a plaintiff's valid patent, through the use of prop-

C. SUITS THE EFFECT OF WHICH WILL BE TO INTERFERE SERIOUSLY WITH THE GENERAL ACTIVITIES OF THE GOVERNMENT ARE BROUGHT AGAINST THE SOVEREIGN

There is yet another type of suit against officials alleged to be acting in excess of their authority which must be held in fact to be brought against the Government. If the relief sought will reach beyond the plaintiff's grievance and will interfere

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erty owned or leased by the United States. *Belknap* v. *Schild*, 161 U. S. 10; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601; *McCreery Eng. Co.* v. *Mass. Fan Co.*, 180 Fed. 115 (C. C. Mass., 1910). The Secretary of War, the Court held in *Goldberg* v. *Daniels*, 231 U. S. 218, 221–222, cannot be required to turn over a naval vessel alleged to have been validly sold to the claimant since "The United States is the owner in possession of the vessel. It cannot be interfered with behind its back, and as it cannot be made a party, this suit must fail." Attempts to establish title to public lands by bills of injunction against the Secretary of the Interior or Commissioner of the General Land Office must fail. *Minnesota* v. *Hitchcock*, 185 U. S. 373; *Naganab* v. *Hitchcock*, 202 U. S. 473; *Oregon* v. *Hitchcock*, 202 U. S. 60; *New Mexico* v. *Lane*, 243 U. S. 52; *Louisiana* v. *Garfield*, 211 U. S. 70; see *Work* v. *Louisiana*, 269 U. S. 250, 254, 261. So must attempts to control the management and disposition of lands, or their proceeds, ceeded to Indian tribes but in the possession of the Government, *Morrison* v. *Work*, 266 U. S. 481, 485. An action by a bank depositor to compel state agencies to make payments from, or levy assessments for, a Depositors Guaranty Fund, the title of which was in the State, will be denied. *Lankford* v. *Platte Iron Works*, 235 U. S. 461. Nor may state creditors obtain payment of state funds. *Louisiana* v. *Jumel*, 107 U. S. 711. And landholders may not foreclose a mortgage on a railroad which had been sold to the State in proceedings alleged to be void. *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446. See also *Leather* v. *White*, 266 U. S. 592, affirming 296 Fed. 477 (C. C. A. 7th).

with those basic activities necessary to sustain the Government and to enable it to function, the suit is in truth brought against the Government itself. In *Louisiana* v. *McAdoo,* 234 U. S. 627, 632, this Court held that to allow a domestic sugar producer to sue to enjoin the Secretary of the Treasury from collecting less than the alleged legal tariff on sugar imported would "obviously * * * operate to disturb the whole revenue system of the Government and affect the revenues which arise therefrom," and would "clog the wheels of government." For this reason, it was concluded that "such suits would obviously, in effect, be suits against the United States." Cf. *Morrison* v. *Work,* 266 U. S. 481.

Respondents doubtless will argue that this is not such a case, and that they seek only to bid for Government contracts without regard to the challenged specifications. But we have already shown that respondents seek in fact to control the award of Government contracts (*supra,* pp. 41–44, 61) and that if this suit can be maintained so, too, may any disgruntled bidder obtain the aid of a court of equity against completion of contracts with others (*supra,* pp. 41–43, 61, 66). And we have sketched the far-reaching consequences which such a rule might work upon the contracting and purchasing functions of the Government (*supra,* pp. 62–70). This case, for the reasons earlier developed, thus seems well within the doctrine of *Louisiana* v. *McAdoo, supra.*

D. THE CASES RELATING TO THE REGULATORY ACTIVITIES OF THE GOVERNMENT, OR WHERE THE RELIEF DOES NOT SETTLE THE TITLE TO OR POSSESSION OF THE UNITED STATES, ARE INAPPLICABLE

Respondents hitherto have not met the cases or the doctrines which have been discussed above. They have, instead, based their argument upon two lines of cases, neither of which has any application to the issues at bar.

1. Proceedings against officials which involve solely the regulatory functions of the government cannot ordinarily be said to be directed against the sovereign or to require that it be made a party. In this category fall most of the classic decisions permitting suits against officers to enjoin action under an unconstitutional statute or in excess of valid authority.[47]

In these cases, it is unnecessary to go beyond the simple fact that the defendant officials have acted in excess of their authority. In theory, at least, no interest of the state, as contrasted with those of the individual who is being sued, is involved. If the statute is unconstitutional, the unlawful act is not the wrong of the state but "is the mere wrong and trespass of those individual persons who falsely speak and act in its name." *Poindexter* v. *Green-*

[47] *Ex parte Young*, 209 U. S. 123; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; *Waite* v. *Macy*, 246 U. S. 606; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Gegiow* v. *Uhl*, 239 U. S. 3; *Truax* v. *Raich*, 239 U. S. 33; *Pierce* v. *Society of Sisters*, 268 U. S. 510; *Allen* v. *B. & O. R. Co.*, 114 U. S. 311.

how, 114 U. S. 270, 290; *Ex parte Young*, 209 U. S. 123, 151; *In re Ayers*, 123 U. S. 443, 507. If the statute does not justify his action, it is evident that the defendant cannot defend his conduct by reliance upon his governmental authority and the relief granted does not affect in any manner the proprietary or contractual interests of the state. While the suit would otherwise affect the governmental interest in the enforcement of the law, this interest may, broadly speaking, be said by definition to be nonexistent when the statute is challenged as unconstitutional; the government, that is, has no proper interest in enforcing an invalid law.

We recognize that, if the action be valid, the immunities of the federal government are not to be varied according as the action is characterized as "proprietary" as distinguished from "regulatory." *Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466. But the distinction which we seek to draw is simply between the governmental interests affected by granting the relief sought. The Government has an interest in its property or contracts even if they relate to an invalid law;[*] it may be supposed to have none in the enforcement of an invalid regulation.

It is unnecessary here to consider whether those cases allowing relief against enforcement of invalid laws are consistent with the general doctrine of

[*] See *Kay* v. *United States*, 303 U. S. 1; *United States* v. *Kapp*, 302 U. S. 214, 217.

immunity from suit. We suggest the analysis which may be taken to justify the result, simply to show that respondents can claim no benefit under this doctrine. Plainly enough, the Government's interest in this suit springs not alone from a desire that the law be obeyed but also from its impact upon its contracting and purchasing functions.

2. There have, it is true, been cases where suit against the officer was allowed although the property interests of the Government were to some extent involved. But, it is important to note, in none of these decisions did the relief undertake conclusively to determine the title to or possession of the Government and in none was the contracting activity of the Government subjected to the control of the Court. Accordingly, respondents, who seek to have the Court rewrite the Government's steel contracts, can gain no comfort from these decisions.

(a) Certain actions to recover property have been allowed where they were directed solely against the defendant as a private common-law tort-feasor.[49] Such judgments, as the courts have

[49] *United States* v. *Lee*, 106 U. S. 196, 210, 219 (ejectment to recover possession of Arlington cemetery from two army officers); *Tindal* v. *Wesley*, 167 U. S. 204 (ejectment against individual alleged to be in possession of land as a state official); *Scranton* v. *Wheeler*, 179 U. S. 141, 152 (ejectment); *Poindexter* v. *Greenhow*, 114 U. S. 270 (detinue for personal property alleged to be destrained by defendant for delinquent taxes); *Goltra* v. *Weeks*, 271 U. S. 536 (injunction to prevent trespass); *Noble* v. *Union River Logging*

often recognized, do not bind the sovereign in any way; no plea of *res adjudicata* against a state can be based upon them. As the Court said in *Tindal* v. *Wesley*, 167 U. S. 204, 223:

> The State not being a party to the suit, the judgment will not conclude it. Not having submitted its rights to the determination of the court in this case, it will be open to the State to bring any action that may be appropriate to establish and protect whatever claim it has to the premises in dispute. Its claim, if it means to assert one, will thus be brought to the test of the law as administered by tribunals ordained to determine controverted rights of property; and the record in this case will not be evidence against it for any purpose touching the merits of its claim.[70]

R. Co., 147 U. S. 165 (trespass on plaintiff's vested right of way); see *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 452 (explaining *United States* v. *Lee* and other cases as involving merely suits for personal torts). Cf. *Cammeyer* v. *Newton*, 94 U. S. 225, 234, holding an official personally liable in damages for patent infringement while doing government work; contrast *Belknap* v. *Schild*, 161 U. S. 10, *supra*, holding that a suit to enjoin an official from infringing a patent on behalf of the government was a suit against the United States. In the former case, a judgment would not affect any interest of the United States, while in the latter it obviously would.

[70] See, also, *Scranton* v. *Wheeler*, 179 U. S. 141, 152; *United States* v. *Lee*, 106 U. S. 196, 217, 222; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 452; *Carr* v. *United States*, 98 U. S. 433; *Hussey* v. *United States*, 222 U. S. 88, 93.

It seems evident, since, as we have shown above in Point I, none of the petitioners can be said to have committed any private tort against the respondents, the decisions in this group of cases cannot support an action against them.

(b) In other cases, in which the proceedings are not cast into the form of common-law private actions, relief is still available because to grant it will not interfere with the protected interests of the state. Upon the granting of an injunction in *Work* v. *Louisiana*, 269 U. S. 250, compelling the Secretary of the Interior not to consider the mineral character of lands in determining whether they were swamp lands granted to Louisiana, no property interest of the United States was directly affected—title, use, and possession of the lands remaining as before, and the Secretary was authorized to reach a decision as to title upon any other ground. The relief granted may have changed the action of the Secretary, but it did not change the position of the United States or affect its interests.[11] Similarly, the mandamus issued in *Garfield* v. *Goldsby*, 211 U. S. 249, to prevent the Secretary's striking the plaintiff's name from the rolls as an approved member of a certain tribe (which membership carried with it certain privileges to select land) had no direct, immediate, or contemporaneous effect upon the interests of the United States

[11] To the same effect, see *Payne* v. *Central Pac. Ry. Co.*, 255 U. S. 228, 238; *Payne* v. *New Mexico*, 255 U. S. 367, 373; cf. *Santa Fe Pac. R. R. Co.* v. *Fall*, 259 U. S. 197.

in the public lands. The same is true of an injunction to prevent the Secretary from insisting that plaintiff pay the whole (rather than half) the cost of surveying lands allotted to it. *Santa Fe Pac. R. R. Co.* v. *Lane*, 244 U. S. 492. In *Lane* v. *Watts*, 234 U. S. 525, it was apparently conceded that if title was not in the United States on the face of the bill, the suit was not directed against the United States (pp. 536–537), and the Court came to that conclusion (p. 540); in that posture of the case, the defendants were merely casting a cloud on plaintiff's valid preexisting title. *Ickes* v. *Fox*, 300 U. S. 82, rested upon a decision by the Court that the United States had in fact no property interest to protect or contractual obligations to perform.

In *Colorado* v. *Toll*, 268 U. S. 228,[72] the State's claim rested on its assertion that certain rights in the lands and roads did not belong to the United States; a determination in its favor would necessarily prevent an injunction from affecting United States property. In *Northern Pac. Ry. Co.* v. *North Dakota*, 250 U. S. 135 (cf. *Dakota Central Tel. Co.* v. *South Dakota*, 250 U. S. 163), the jurisdiction of the court was conceded (p. 143), and, since the Court found the acts of the defendant fully authorized, it was unnecessary to consider whether the suit was against the United States.

[72] Suit to enjoin the Superintendent of Rocky Mountain National Park from enforcing certain regulations relating to the government of the Park, especially regulations concerning the use of the highways.

In these three cases the actions were brought by states. They may well rest on a special right of a state, asking to have jurisdictional doubts resolved in its favor, to sue in cases which might otherwise be held to be directed against the United States. Cf. *Missouri* v. *Holland*, 252 U. S. 416, with *Minnesota* v. *United States*, 305 U. S. 382.

In this manner, the courts have accommodated the competing principles of protecting the Government against involuntary suit and protecting the citizen against any arbitrary official aggression. Certainly, we believe, *no* theory which would permit respondents to maintain this suit can be squared with the historic decisions and policies of this Court.

III

THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION IN EQUITY FOR AN INJUNCTION

Even if respondents have not sought to implead the United States, and even if they have sufficient legal standing to maintain this action, they cannot secure injunctive relief unless they clearly bring themselves within the equitable jurisdiction of the courts.[73]

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[73] That a legal right may have been invaded is not in itself enough to ground relief; nor is it enough that petitioners' action may be found to be illegal or unauthorized. *Boise Artesian Hot & Cold Water Co.* v. *Boise City*, 213 U. S. 276, 283; *Indiana Mfg. Co.* v. *Koehne*, 188 U. S. 681, 690; *Northport Power & Light Co.* v. *Hartley*, 283 U. S. 568, 570. In addition, the specific need for equitable relief must always

The complaint, in summary, merely alleges that the respondents are steel manufacturers, some of whom have at times obtained Government contracts on which they have generally realized profits; that invitations to bid on large and important steel contracts will probably be let in the immediate future, on some of which contracts respondents desire to bid at prices sufficient to secure profits; that unless the petitioners are enjoined from requiring the inclusion of a wage stipulation in these contracts, the respondents will suffer immediate, irreparable, and irrecoverable damages in that (1) they will be deprived of the right to bid free of unlawful limitations, (2) if they submit bids including the stipulation they may be estopped from attacking the validity of the determination, and may run the risk of harsh penalties, (3) an increase in their minimum wage rates for common laborers will, as a practical matter, increase the rates of pay for all employees including those not engaged on Government business, (4) if they have to pay the established wages, there is grave danger that they will not be able to compete successfully for government contracts with the larger steel companies, (5) and they have no adequate remedy at law. (R. 36–38, 313, 316–317.)

The injuries alleged are of an entirely speculative character. Respondents can suffer no damage

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be shown to meet the standards of urgency required by the traditional equity practice. *Petroleum Exploration Inc.* v. *Public Service Comm'n.*, 304 U. S. 209, 218.

unless contracts in which they are interested are to be awarded,[74] unless they bid on these contracts, unless they are the lowest bidders, unless they are awarded the contract, unless they profit from the contract if they do get it, and unless they could not make the same profits elsewhere. Even at the end of this chain, with each link only a problematic hypothesis, there is no showing that the loss in profits will be large, either absolutely or in comparison with the respondents' entire business.[75] Injunctions are not issued upon such a tissue of possibilities.[76] Thus, even if there be no legal rem-

[74] The complaint does allege that the respondents desired to bid on certain specific Navy contracts to be let shortly after March 2, 1939 (R. 33–34). Since these contracts have been let these allegations may now be ignored. No other reference to specific contracts in which respondents are interested is made in the complaint.

[75] The complaint contains nothing whatever on the amount of Government business done by respondent South Chester Tube Company (R. 5–6), and respondent Atlantic Wire Company does not allege that it has ever bid on Government contracts (R. 8–9). The allegations of the other respondents simply contain figures as to, or, in one case, the percentage of gross sales to the Government, with a general allegation that respondents have "generally" realized profits on their Government contracts (R. 313).

[76] *Ames & Co.* v. *Wallace*, 1 S. C. D. C. (N. S.) 238, affirmed on other grounds, 81 F. (2d) 414 (App. D. C.); Spelling & Lewis, *A Treatise on the Law Governing Injunctions* (1926), §§ 33, 35, 36; Joyce, *A Treatise on the Law Relating to Injunctions* (1909), § 1069; cf. *Hegeman Farms Corp.* v. *Baldwin*, 293 U. S. 163, 170; *California* v. *Latimer*, 305 U. S. 255, 260; *Petroleum Exploration, Inc.* v. *Public Service Comm'n.*, 304 U. S. 209.

edy whatever, there can be no relief by injunction for respondents have failed to show any demonstrable injury.

IV

THE PREVAILING WAGE DETERMINATION IS A VALID EXERCISE OF DISCRETION CONFERRED BY THE PUBLIC CONTRACTS ACT

The respondents have directed the bulk of their argument to the proposition that the prevailing wage determination is invalid and beyond the jurisdiction and authority of the Secretary of Labor under the Public Contracts Act (Br. in Opp. pp. 6, 10–18, 20–21, 23–31). As we have shown in the preceding sections of this brief, there is no occasion for the Court to pass upon this question, as the respondents have no standing to maintain this action, because none of their legal rights have been infringed, because the suit is brought against the United States without its consent, and because respondents have suffered no irreparable injury. But, in any case, we believe that their attack upon the wage determination is wholly without foundation.

The primary contention advanced by the respondents is that the Acting Secretary's determination is based upon a misconstruction of Section 1 (b) of the Public Contracts Act, which directs [11]

[11] Section 11 provides that the minimum wage provisions of Section 1 (b) shall be applicable only to contracts relating to such industries as have been the subject matter of a de-

that Government supply contracts shall provide for payment to employees of contractors of:

> * * * not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract; * * *

The minimum wage determination for the iron and steel industry establishes six localities in the United States for purpose of the Public Contracts Act, in one of which (comprising thirteen northeastern states, several counties of West Virginia, and the District of Columbia) the respondents' plants are situated. The respondents contend (and the majority of the Court below held) that "locality" as used in the phrase "locality in which the materials * * * are to be manufactured" means a "community," "local center of manufacture," or other small area and does not authorize the Secretary to establish as localities "regions" or "broad geographical areas."

In the lower courts, the respondents also contended that, even if the Public Contracts Act authorizes the designation of localities as large as those designated in the challenged wage determina-

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termination by the Secretary of Labor, and thus insures that the minimum wages shall be determined in advance of the bidding for the contract.

tion, the determination is arbitrary and capricious. The Court of Appeals did not pass on this contention (since it held that in any case the determination is based upon an erroneous construction of "locality"), and the respondents have so far advanced their second contention in this Court only by implication (Br. in Opp. pp. 14–18).

A. THE WAGE DETERMINATION IS BASED UPON A PROPER CONSTRUCTION OF THE PUBLIC CONTRACTS ACT

In support of their contention that the determination rests upon an erroneous construction of the relevant language of the Public Contracts Act, the respondents have put forward two distinct arguments. First, they claim that the intrinsic meaning of the word "locality" is such as to confine the scope of the Secretary's discretion to the designation of small areas, in no event more extensive than a large metropolitan community.[18] Second, the respondents contend that the context and legislative history of the Public Contracts Act show that Congress intended the word to have the restricted meaning for which they argue.

[18] Before the lower courts, the respondents contended that "locality" must be interpreted to mean "the city, county, village, or other civil subdivision of a State in which work under a particular Government contract is to be performed, or the immediate vicinity of that place, or, at most, a small geographical area" (R. 26). The Court of Appeals stated that "in ordinary and common usage locality is synonomous in meaning with such words as place, vicinity, neighborhood, and community" (R. 390).

We believe it is entirely clear that neither of these contentions has any foundation. This Court and other courts have recognized that the word "locality" is one of flexible contours, the precise meaning of which is to be determined by reference to the objectives sought to be achieved and the evils sought to be suppressed by the legislation in which it is used. And, as regards the Public Contracts Act, any limitation of the "locality" unit to "local centers of manufacture" or "communities" will obstruct accomplishment of the very objectives which Congress sought to achieve by this legislation, covering, as it does, the many and varied industries whose products are purchased by the Federal Government.

1. The word "locality" has no such intrinsic meaning as to exclude the geographic units established by the wage determination; it has a flexible and variable meaning depending upon the purpose for which it is used.

The theory upon which the majority of the court below concluded that the intrinsic meaning of "locality" is such as to render the determination invalid because of the size of the localities therein designated is set forth in the prevailing opinion as follows (R. 390–91):

> Popular acceptance and usage accord to the word *locality* connotations of common interest and understanding, such as are revealed in the following expressions: Local self-government, our local schools, local interests, a local concern, local option, local boy makes good, local items as used in news-

> papers, local prejudices, local talent * * * local anesthetic and *location* as used in mining law, and in motion picture parlance. In ordinary and common usage *locality* is synonymous in meaning with such words as *place, vicinity, neighborhood,* and *community.* These words, also, are too indefinite to be used for purposes of exact measurement in terms of acres or square miles. But neither they nor *locality* itself, in any case, connote large geographical areas, with widely diverse interests, such as the fourteen states and the District of Columbia, grouped in the protested determination.

The respondents seek to advance their argument in similar terms (Br. in Opp. pp. 23–24). Both the court below and the respondents contend that, had Congress intended to authorize the designation of large geographic units, a word such as "area" or "region" would have been used in the Public Contracts Act in lieu of "locality" (R. 391; Br. in Opp. pp. 23–24).

In truth, the word has no such necessarily restricted meaning, nor is there such a gulf between the meaning of "locality" on the one hand and "area" or "region" on the other as respondents seek to fix. To be sure, "locality" is often used to denote a small geographic unit, and in appropriate context and circumstances may be given such a meaning.[79] The view of the court below that the

[79] Thus, in legislation requiring building contractors to pay the prevailing wage in the locality where a building is to be erected, the locality in which the work is to be per-

word necessarily and as a matter of law has a meaning of the kind suggested by "location, as used in mining law, or in motion-picture parlance" or by "local anesthetic," or by "neighborhood," or "community," [80] suggests too much faith in the precision of common speech. Certainly it is in sharp contrast to the decisions of this Court and other courts, which recognize that the term "locality" suggests

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formed is known in advance of the bidding to be the area immediately surrounding the construction site, and the term accordingly denotes a small geographical area. Examples of such legislation are the Emergency Relief Appropriation Acts of 1937 (50 Stat. 352, 354, § 2) and 1938 (52 Stat. 809, 812, § 9) and in the Housing Acts of September 1, 1937 (50 Stat. 888, 897) and June 3, 1939 (53 Stat. 807). But, as shown hereinafter, the word is frequently used in other statutes where obviously no such restricted meaning was intended.

[80] Apparently, the Court of Appeals used the word "community" in the sense of a metropolitan community, although the context in which the word was used in the extract cited by the court (R. 391, n. 34) from Holmes, *The Common Law* (p. —), rather clearly indicates that the term was there used to refer to a much broader geographical area within which common political mores prevail. The passage is taken from the lecture on the criminal law and the context is as follows:

"* * * it may be said, not only that the law does, but that it ought to, make the gratification of revenge an object. * * * The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong. If people would gratify the passion of revenge outside of the law, if the law did not help them, the law has no choice but to satisfy the craving itself, and thus avoid the greater evil of private retribution."

no precise geographical boundaries, and uniformly construe the term to denote varying geographic areas depending upon the framework of the statute in which it is used, the legislative purpose sought to be achieved, and the evils sought to be suppressed. *Connally* v. *General Construction Co.*, 269 U. S. 385; *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627; *Ruark* v. *International Union of Operating Engineers' Union*, 157 Md. 576, 146 Atl. 797 (1929); *Pierce* v. *Dillingham*, 96 Ill. App. 300 (1901); *State* v. *Fremont, E. & M. V. R. R. Co.*, 22 Neb. 313, 35 N. W. 118 (1887).[81]

Connally v. *General Construction Co., supra,* seems conclusive. There this Court held that the Oklahoma criminal statute requiring payment of not less than the "current rate of wages" in the "locality" where work is performed on a state contract involved a denial of due process because of the vague and uncertain boundaries of the unit within which contractors were required to apply the wage standard.[82] According to the Court, it was impos-

[81] See, also, *Metropolitan Water District of Southern California* v. *Whitsett*, 215 Cal. 400, 10 Pac. (2d) 751 (1932); *Murphy* v. *Worcester Consol. Ry. Co.*, 199 Mass. 279, 85 N. E. 507 (1908); *State* v. *Tibbetts*, 21 Okla. Cr. 168, 205 Pac. 776 (1922); *Severance* v. *Murphy*, 67 S. C. 409, 46 S. E. 35 (1902); *People ex rel. Melledy* v. *Shea*, 73 App. Div. 232, 76 N. Y. S. 679 (1902); *Foster* v. *Hart Consolidated Mining Co.*, 52 Col. 429, 122 Pac. 54 (1912).

[82] The constitutional vice of the statute arose from the fact that no provision was made for predetermination of the appropriate boundaries of the locality and each contractor was therefore required to exercise his own discretion in de-

sible to tell "what areas constitute the locality," and the word is "elastic and dependent upon circumstances" (p. 395). It would seem to follow, *a fortiori*, that an administrative agency is possessed of the power to define the term to meet the needs of a particular statute. In the *Connally* case, it may be observed, "area" was used in the opinion in a *more restricted* sense than "locality."

In the *Texas & Pacific case, supra*, the specific question before this Court was whether the ports through which traffic passes into foreign commerce were "localities" within the meaning of Section 3 (1) of the Interstate Commerce Act (Act of Feb. 4, 1887, c. 104, § 3, 24 Stat. 379; 49 U. S. C. § 3), which makes it unlawful for any carrier "to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality * * *." The majority of this Court held that ports were not "localities" (because the practices which Congress sought to suppress were not thought to embrace discriminations against intermediate gateway ports), but the opinion clearly indicated that the word should be construed in the light of its context, and that there is no such distinction between "localities" and

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termining those boundaries in order to avoid criminal penalties. Cf. *Metropolitan Water Dist.* v. *Whitsett*, *supra*; *Campbell* v. *City of New York*, 244 N. Y. 317, 155 N. E. 628; *Commonwealth* v. *Daniel O'Connell's Sons*, 281 Mass. 402, 183 N. E. 839. The Public Contracts Act, of course, provides just such a procedure for predetermination of the bounds of "localities."

"areas" as the respondents and the court below urge (p. 638):

> The word "localities," therefore, has its proper office as denoting the origin or destination of traffic and the shipping, producing, and consuming areas affected by rates and practices of carriers.

In the *Kuark case, supra,* the Supreme Court of Maryland considered the meaning of "locality" in a statutory provision requiring contractors, in the execution of contracts for public works within the City of Baltimore, to pay not less than the current rate of per diem wages in the "locality" where the work is performed. A "locality" in a law applying only within a city is obviously a small geographic unit, but the court discarded *a priori* considerations in its treatment of the word, and found no such difference between "locality" and "region" as the respondents here urge (157 Md. at 584-6):

> While "locality" is a word of relative meaning, its context commonly determines its meaning * * * whatever may be the scope of its varying significance, its meaning in a particular statute is susceptible of being determined from the context, since the words of a statute are to be understood in the sense in which they best harmonize with the subject of the enactment and the object which the Legislature had in view * * * In other words, "locality" defines a region, with the public undertaking as an axis or focal point, throughout which region the

daily wage of the particular class to which the worker belongs is uniform.

This language assumes added significance in view of the fact that during the course of the hearings on the Healey bill[83] the *Ruark* case was specifically called to the attention of the subcommittee of the House Committee on the Judiciary.[84]

In *Pierce* v. *Dillingham, supra,* the court recognized (p. 313) the variable meaning of "locality" as embracing "a country, a state, a county, a town, or a portion thereof," at the same time observing that the geographic connotations of the term are such that "neither the world nor the greater portion of it is spoken of as a locality."

In each of the cited cases it will be seen that the word "locality" was construed to embrace whatever area was necessary to permit accomplishment of the legislative purpose. Certainly, if this be the case, the Secretary is authorized to read the term with corresponding elasticity in order to meet the needs of the Act.

That common usage does not dictate the intrinsically narrow geographic connotation imposed on

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[83] As indicated *infra*, p. 106, n. 93, 112–114, the Healey Bill (H. R. 11554, 74th Cong., 2d Sess.) differed materially from the bill finally enacted by Congress. The bill in its final form, utilizing the prevailing wage standard and the locality unit, was drafted subsequent to the reference to the *Ruark* case.

[84] Hearings before a subcommittee of the House Committee on the Judiciary, 74th Cong., 2d Sess., on H. R. 11554, p. 532, 538.

"locality" by the Court below [85] is also shown by the use of the word in other federal statutes. For instance, the "rebate" and "undue preference" provisions of the Interstate Commerce Act,[86] which have already been referred to,[87] clearly are designed to protect any "locality," of whatever size, against discrimination. Certainly it would be flying in the face of the statutory policy to hold that discrimination of a "sectional" nature—i. e., against a region comprising several states—is not prohibited, on the ground that "locality" cannot denote a geo-

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[85] Dictionaries commonly give as one of the recognized meanings of "locality" the flexible and variable meaning appropriate in the context of the Public Contracts Act. The New Winston Simplified Dictionary, A Reference Library (1939): "1. A restriction or limitation to a definite place; 2. A general region or position; a vicinity." Funk & Wagnalls' Practical Standard Dictionary (1929): "1. A definite region in any part of space; geographical position. 2. Restriction to a particular place." The Winston Simplified Dictionary for Schools (1938): "A general region, place, or district; neighborhood." Webster's New American Dictionary (1939): "A region, section, or neighborhood." A New English Dictionary on Historical Principles; Oxford, Clarendon Press (1908): "* * * 4. b. A place or district, of undefined extent, considered as the site occupied by certain persons or things, or as the scene of certain activities." Anderson's Law Dictionary, cited in *Pierce* v. *Dillingham*, *supra:* "A particular district; confined to a limited region; opposed to general; limited by boundaries, large or small; as a country, a state, a county, a town, or a portion thereof."

[86] Sections 3 (1) and 13 (4) of the Interstate Commerce Act (49 U. S. C., Supp. IV, Secs. 3 and 13).

[87] *Supra*, p. 97.

graphic unit of such size."[8] On the contrary, these provisions of the Interstate Commerce Act were clearly designed to prohibit every form of discrimination between and among persons, groups, interests, or geographic units."[9] The size of the geographic units protected is by no means limited to "communities"; on the contrary, "areas," "sections," or "regions" of any size are embraced within the meaning of "locality" as used in the statute. *Texas & Pacific Ry. Co.* v. *United States, supra; Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S. 197, 220, 233. The result is the same under state statutes prohibiting discrimination by carriers, although in such statutes the "localities" must, commonly, be smaller

[8] The administrative construction of these provisions clearly shows that "locality" embraces any geographic unit, of whatever size, although the question is never directly raised, since the statute also protects shippers," and decisions could readily be rested on a showing of discrimination against all the shippers in a large geographic unit, regardless of whether there is discrimination against the unit *qua* unit. The statute is constantly employed by the Interstate Commerce Commission to prevent discrimination between "sections" and "regions," without reference to the geographic scope of "locality." *Consolidated Stone Cases*, 200 I. C. C. 65 (1934); *Consolidated Southwestern Cases*, 218 I. C. C. 11 (1936), 123 I. C. C. 203 (1927); *Cotton, Woolen and Knitting Factory Products*, 211 I. C. C. 692 (1935); *Cotton From and To Points in the Southwest and Memphis*, 208 I. C. C. 677 (1935).

[9] It should be noted that, immediately following the *Texas & Pacific case, supra*, which held that "localities" did not include ports, Congress promptly amended the statute, so as expressly to include ports. Act of August 12, 1935, c. 509, 49 Stat. 607.

than and within the state. In *State* v. *Fremont, E. & M. V. R. R. Co., supra,* where such a state statute was involved, the court said (35 N. W. 118, at p. 125):

> There can be no restriction of the word "locality." It may refer to a village, city, county, or portion of the state, the meaning in each case to be determined by the territory which the board shall find to be unjustly discriminated against.

The word in question is also used in Section 1 of the Cattle Contagious Diseases Act of Feb. 2, 1903 (c. 349, 32 Stat. 791; 21 U. S. C. § 121), and in Section 7 of the Plant Quarantine Act of Aug. 20, 1912 (c. 308, 37 Stat. 317; 7 U. S. C. § 160). In both cases it is clear that Congress intended "locality" to mean a geographic unit of any size necessary under particular circumstances. For instance, Section 7 of the Plant Quarantine Act provides[*] that whenever the Secretary of Agriculture, in order to prevent the introduction into the United States of plant diseases not theretofore widely prevalent within the United States, determines

> that it is necessary to forbid the importation into the United States of any * * * class of plants * * * from a country or locality where such disease * * * exists, he shall promulgate such determina-

[*] Note also the use of the word in the title of the succeeding section of the Plant Quarantine Act (7 U. S. C., § 161).

> tion, specifying the country and locality and the class of * * * plants * * * which, in his opinion, should be excluded. * * * Following the promulgation of such determination * * * the importation of * * * plants * * * specified in the said promulgation from the country and locality therein named, * * * is hereby prohibited; * * *.

Under this section, the Secretary of Agriculture may exclude plants from a "country" or from a "locality." Thus, Quarantine No. 41, issued by the Secretary of Agriculture on April 23, 1926, as revised and supplemented by rules and regulations issued by the Secretary of Agriculture on February 10, 1933, in effect prohibits the importation of corn on the cob from the provinces of Canada east of the eastern boundary of the Province of Manitoba. Regardless of whether residents of St. John, Nova Scotia, regard themselves as "neighbors" of the residents of Baffin Land, or of Windsor, Ontario, and although there are doubtless but few local centers of corn production in this vast region,[91] embracing several times the area of the "locality" here attacked, it seems wholly clear that the determination restricting importation from this area would not be regarded as an arbitrary and capricious application of the word "locality" in view of the Congressional purpose evidenced in the Plant Quarantine Act.

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[91] *Cf.* the prevailing opinion below (R. 390-91).

If any rule of statutory construction were settled beyond dispute, we should have supposed it to be that which gave to the terms of common speech a scope which varies according to their context and purpose. *Towne* v. *Eisner*, 245 U. S. 418, 425; *American Security & Trust Co.* v. *District of Columbia*, 224 U. S. 491, 494; *People of Porto Rico* v. *Rosaly*, 227 U. S. 270, 275. Particular words are not used, as a mason uses building stone, to fill precisely a premeasured need. Instead, taken alone, most words can do no more than to suggest the general direction of the author's thought. In its context, the word is refined to a more exact content. A workable precision can often, or even ordinarily, be found only when the verbal context is placed against the historical context of the occasion for and the purpose of the language used. This process is the heart of statutory construction, and we should have thought that not since the rules were formulated (*Heydon's Case*, 3 Co. Rep. 7a, 7b, 76 Eng. Rep. 637, 638), would a court attempt to solve the problems of the wages to be paid by government contractors through reference to the terminology of surgery, sports, motion pictures, and the like.

2. The purposes and legislative history of the Public Contracts Act show that a restriction of "locality" to a "community" or other small geographic unit was not intended by Congress and would defeat the objectives of the Act

The court below found support for its construction of "locality" in certain statements in the

House of Representatives made by Congressmen (not in charge of the bill) during the debates on the measure. It said (R. 394–95):

> To permit the Secretary to establish a minimum wage scale for the area embraced within fourteen States and the District of Columbia would be to defeat rather than to accomplish the purpose of the Act. Under the circumstances it is not necessary to look farther to discover the legislative intent. But if there were any element of vagueness or uncertainty in the language used, either as to the purpose of the Act in using the word locality or as to the intent of Congress that the Secretary of Labor should not be empowered thereby to fix wages, it would be eliminated immediately by reference to explanations given on the floor of the House by those in charge of the measure.

The respondents advance the same contention (Br. in Opp. pp. 23–24). In fact, while the court below is correct in saying that Congress did not intend to empower the Secretary of Labor to "fix" wages, such an analysis of the purpose of the Act is wholly misleading and superficial as applied to this case. Furthermore, the "explanations given on the floor of the House" are in part irrelevant and in part incorrect and incompetent for present purposes,[92] and other highly relevant and significant

[92] With one exception, the extracts from the Congressional Record cited by the court below were not made by Congressman Healey, who was in charge of the bill. The one state-

phases of the legislative history were entirely overlooked.

(a) The objectives of the Public Contracts Act

The Walsh-Healey Act or Public Contracts Act,[93] as finally enacted on June 20, 1936, and approved June 30, 1936, was the immediate product of an effort initiated in Congress within a month after the decision in *Schechter Poultry Corporation* v. *United States*, 295 U. S. 495, to exert the purchasing power of the United States Government to preserve the advanced labor standards[94]

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ment quoted from Congressman Healey's remarks is totally irrelevant. Under well-settled principles, the other statements are of no weight in judicially construing particular language in the statute. *Infra*, pp. 123, 124.

[93] The Walsh bill (S. 3055, 74th Cong., 1st Sess.) was introduced in the Senate on June 14, 1935, and, as amended, passed the Senate on August 12, 1935. This bill was referred to the Committee on the Judiciary of the House of Representatives. This committee studied the bill during the recess of Congress and at the beginning of the second session a new bill, the Healey bill (H. R. 11554, 74th Cong., 2d Sess.), was introduced. Hearings were held by a subcommittee of the Committee on the Judiciary, of which Representative Healey was chairman, on the Healey bill which was eventually tabled, and S. 3055 was amended by the substitution of a new draft differing from both the Walsh and Healey bills. As thus amended, S. 3055 passed the House of Representatives after general debate on June 18, 1936, and the amendment was accepted by the Senate without debate on June 20, 1936.

[94] As early as 1892 Congress adopted the policy of controlling the award of Government business in such a manner as to encourage the maintenance of high labor standards. The Act of August 1, 1892, c. 352, § 1, 27 Stat. 340,

which had been achieved under the National Industrial Recovery Act.[95] Concern in Congress was felt not only for the welfare of labor as such, but also because extensive reduction of wages[96] meant reduced consumer purchasing power, restricted demand for the products of industry, and a further spread of unemployment.[97]

In addition to the desire to support and stimulate the national economy by maintaining wage scales, consumer purchasing power, and general standards of living, Congress sought to remove the United

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40 U. S. C. sec. 321, established the eight-hour day for laborers and mechanics employed on public works of the United States or the District of Columbia. In 1912 this policy was extended beyond the construction industries into the broader field of industries whose products the Government purchases. Act of June 19, 1912, c. 174, § 1, 37 Stat. 137, 40 U. S. C. sec. 324. Cong. Rec. Vol. 48, Part 1, p. 388; Sen. Rep. 601, 62d Cong. 2d sess., Cong. Rec. Vol. 48, Part 6, p. 6108.

[95] The first attempt to control the award of Government contracts generally in such a manner as to support fair minimum wage standards occurred under the authority of Executive Order No. 6646, issued by the President on March 14, 1934, under authority of Title I of the National Industrial Recovery Act, Act of June 16, 1933, c. 90, 48 Stat. 195.

[96] Studies made by the Government Contracts Division of the National Recovery Administration in 3507 firms engaged in performing various types of contracts with the federal government revealed that between September and December 1935, 1480 or 42.20% of the firms investigated had reduced wages and 1309 or 37% had increased hours. Hearing before a Subcommittee of the House Committee on the Judiciary, 74th Cong., 2d Sess., on H. R. 11554, Serial 12, Part 2, pp. 131–153.

[97] See Appendix C, *infra*, pp. 20–28.

States Government from the position of encouraging sweatshop and substandard wage conditions by awarding contracts to manufacturers who, by paying excessively low wages to their employees, were in a position to underbid their higher wage-paying competitors. This is clearly shown by the extracts from the Congressional Record, and from the hearings on the Walsh and Healey bills printed in Appendix C, pp. 20–56.

Closely connected with the sweatshop and substandard wage problems is the tendency of individual plants or even of entire industries to migrate into low-wage areas. Throughout the hearings and debates on the Public Contracts Act, concern was expressed for the social consequences of such industrial migration.[98] As a result of such migration, whole communities may be stranded without source of livelihood, and the very threat of migration operates to depress existing wage levels down toward the level of the lowest wage competitors.

Although the phenomenon of "runaway" shops had been a blight upon industry in various parts of the country, it had been felt especially keenly in Massachusetts, the home State of both Senator Walsh and Representative Healey, the authors of the Public Contracts Act. The nature and causes of the migration of industrial establishments had been the subject of several official investigations in Massachusetts and had become matters of common

[98] See Appendix C, pp. 20–56.

knowledge. One of the early studies of runaway plants in Massachusetts was conducted by the Governor's Committee on the Shoe Industry.[99] In its report, the Committee observed the ease with which shoe factories might be moved to avoid minimum wages set for small areas. The N. R. A. Shoe Code had provided different wage minima for towns of varying size. Within a few months, there was a widespread shifting of shoe factories to outlying towns in Massachusetts and in other states.[1] The Committee reported also (pp. 4–5) the testimony of the Secretary of the Brockton Shoe Manufacturers' Association in explanation of the particular circumstances which made the sudden migration of shoe factories possible.[2] That this

[99] Mass., Governor's Committee on Shoe Industry, Gleason L. Archer, Chairman, Report, Apr. 11, 1935.

[1] The Committee's Report (p. 2) listed 21 migrations, involving about 3,300 employees, from the single town of Lynn, Massachusetts, during the period from August 1, 1933, to January 1, 1935.

[2] "A shoe manufacturer * * * who can convince the United Shoe Machinery Company, which controls about 95 percent of all shoe machinery now operating in the United States, that he is a responsible individual and has a reasonable amount of financial backing, may secure machinery for a factory without being obliged to purchase the same * * *."

"A clever system of royalties on every shoe manufactured in a factory thus equipped brings to the United Shoe Machinery Company the same royalty return irrespective of State or Nation in which the factory is located. There is, therefore, no reason why the Company should play favorites with any locality. Thus, whether a manufacturer sets up in Lynn, Massachusetts, or Skowhegan, Maine, it is all the

situation is still characteristic not only of this but of other industries has been established by numerous other observers.[3]

The "runaway shop" evil is by no means confined to the shoe industry. A Massachusetts legislative commission recently made a general report[4] on industrial migrations from Massachusetts and

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same to the Company. He will be supplied with machinery. Thus it is that the lease system has placed the shoe industry 'on roller skates' as it were, making it possible for manufacturers to move from place to place, or to get up in new localities, without the necessity of heavy investments."

[3] Carson, W. J. (ed.), *The Coming of Industry to the South*, 1931, January 1931 issue, Annals of the American Academy of Political and Social Science; Creamer, D. B., *Is Industry Decentralizing?* 1935, Bulletin III, University of Pennsylvania Press; C. Goodrich, and others, *Migration and Economic Opportunity*, 1936, University of Pennsylvania Press; Hoover, E. M., *Location Theory and the Shoe and Leather Industries*, 1937, Harvard University Press; Schumacher, H.; *Location of Industry*, Volume IX, Encyclopedia of the Social Sciences, 1933, Macmillan; U. S. Department of Labor, Bureau of Labor Statistics, *Productivity of Labor in the Cotton Garment Industry*, 1938, Bulletin No. 662; U. S. National Recovery Administration, Division of Review, *Migration of Selected Industries as Influenced by Area Wage Differentials in the Codes of Fair Competition*, 1936, Work Materials No. 45. A bibliography prepared by the U. S. Bureau of Foreign and Domestic Commerce on the Location of Factories, 1938, lists numerous periodical articles on the subject of industrial migration to low wage areas.

[4] Final Report of the Commission on Interstate Cooperation to the General Court [Massachusetts] Concerning the Migration of Industrial Establishments From Massachusetts, under Chapter 10, Resolves of 1938, House No. 2495, June 1939, pp. 16–18.

noted during the period from 1930 to 1938 the migration of 79 boot and shoe factories into New Hampshire, Maine, Rhode Island, New York, Pennsylvania, and Indiana; 15 boot and shoe cut stock and findings establishments into New Hampshire, Maine, Rhode Island, and New York; 7 tanned, cured, and finished leather manufacturing plants into Maine, New Hampshire, and Delaware; 11 foundries and machine shops into Maine, Rhode Island, Pennsylvania, New Jersey, and New York, and 3 to midwestern states; 4 electrical machinery establishments employing 735 workers; 3 textile machinery plants into Maine and southern states; 3 rubber goods factories into Rhode Island, Connecticut, and Indiana; 12 men's and women's clothing establishments into New York, Rhode Island, Maine, Connecticut, New Jersey, Pennsylvania, and Virginia.

It thus appears that the general objectives of the Public Contracts Act were (a) to exert the purchasing power of the federal government so as to foster a sound national economy by maintaining consumer purchasing power and preventing unemployment and industrial dislocation, and (b) to remove the Government from the position of encouraging and abetting sweatshop and substandard wage conditions. In particular, Congress sought to remove the competitive advantages enjoyed in bidding for Government contracts by firms which paid sweatshop or substandard wages, and thereby

to lend the weight of the Government as a customer to the maintenance of wage levels, and to check in some measure industrial migration to low-wage areas.

(*b*) *The legislative development of the prevailing minimum wage standard*

The formulation of the wage standard in the Public Contracts Act is of particular importance in view of the reliance placed by the Court of Appeals and by respondents upon the similarity of the Public Contracts Act to the Davis-Bacon Act. The original bill (S. 3055, 74th Cong., 1st Session) introduced by Senator Walsh, as amended and passed by the Senate, provided that the minimum wage standard should be "fair and reasonable" and based on such factors as the cost of living, the standards for the same class of labor in the same locality, and the standards prescribed by the N. R. A. codes of fair competition. A similar proposal for a wage founded on standards of fairness and reasonable value was embodied in the revised [5] House measure known as the Healey bill (H. R. 11554, 74th Cong., 2d Session).

This wage standard encountered immediate opposition in the subcommittee of the Committee on the Judiciary to which the bill was referred, the contention being made that it conferred upon the Secretary of Labor unlimited discretion to "fix" wages and hours for all industries.[6] Because of

[5] *Supra*, p. 106, n. 93.

objections that the bill authorized the setting of wage and hour standards higher than those anywhere existing, the Committee amended both the wage and hour standards to limit the scope of administrative discretion. In lieu of the highly discretionary wage standard based on fairness and reasonableness, which could conceivably have permitted the establishment of wages not paid anywhere in industry, the Committee amended the bill so as to provide for payment of the "prevailing minimum wage."

There is no doubt that the prevailing minimum wage standard embodied in Section 1 (b) of the Act in its final form was adapted from the familiar prevailing wage standard of the Davis-Bacon Act,

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[6] The following extract from the hearings on H. R. 11554 (S. 3055), Part 2, page 129 is revealing:

"Mr. MICHENER. As a matter of fact, this bill as drawn, would give to the Secretary of Labor the right to fix hours and wages of most industry in the country, would it not?

"Mr. REILLY. As the bill now stands, it could confer that right only with respect to industries which receive a Government contract and only with respect to the labor actually engaged in the subject matter of the Government contract.

"Mr. MICHENER. Yes; but the bill is so artfully drawn, as a matter of fact, that one could hardly think of a line of endeavor where you would not have to have either the standard of hours and wages, as fixed by the Secretary, or two standards operating in the country at the same time; one which industry fixed and the other which the Secretary fixed.

"In other words, the real purpose back of the bill is to permit the Secretary of Labor to fix the hours and wages throughout the country eventually?"

and proponents of the measure sought to allay the opposition to the standards contained in the earlier drafts by pointing out that this standard was borrowed from the Davis-Bacon Act, that it was not based upon the N. R. A. codes, as was S. 3055, nor did it permit the "wage-fixing" contemplated by H. R. 11554.[7]

But Congress carefully avoided adoption of the entire statutory scheme and "wage-language" of the Davis-Bacon Act. The scheme of the Davis-Bacon Act was designed for application to the construction industry where crafts are well defined. The "prevailing" standard employed by that Act was not a "minimum" wage standard. But craft

[7] Extracts from Cong. Rec., Vol. 80, part 9:

"Mr. HEALEY. * * *

"* * * We have had a great deal of talk about this bill being a small N. R. A. bill for Government contracts. This is absolutely not the truth. This bill does not set the standard for minimum wages by reference to the codes that obtained under N. R. A., but definitely sets it as the prevailing minimum wage for similar work or in the industries operating in the locality in which the contract is to be performed" [at page 10002].

"Mr. WALTER. * * * If there is any grave differences of opinion with respect to any portion of this bill it certainly comes with respect to the possibility, if you please, of the Secretary of Labor fixing wages. There is no Member of this House any more opposed to that idea than I am. I say to you frankly that I would not have voted to report such a bill, but there is nothing in this measure that gives to anyone in any executive branch any authority to fix wages. We have had no difficulty in determining what the prevailing rates of wages are under the Bacon-Davis Act" [at page 10004].

lines are not so well defined in the mass production industries from which supplies and equipment are purchased. Instead of the "prevailing" wage standard of the Davis-Bacon Act, Congress provided a "prevailing *minimum*" wage standard in the Public Contracts Act and instead of determining the prevailing standard for each craft, i. e., "the corresponding classes of laborers and mechanics employed on projects of a character similar * * *," the prevailing minimum wage standard is to be determined with reference to "similar work or in the particular or similar industries or groups of industries * * *."

Furthermore, and of the greatest significance, Congress carefully avoided carrying forward into the Public Contracts Act the Davis-Bacon geographic unit—

> city, town, village, or other civil subdivision of the State in which the work is to be performed.

Instead it selected the phrase "locality in which the materials * * * are to be manufactured or furnished * * *" as the geographic unit within which the mathematical fact of prevalence is to be determined.

(c) *The necessary meaning of "locality in which the materials * * * are to be manufactured" in the light of the purposes and legislative history of the Public Contracts Act*

The foregoing recital of the background and purposes of the Public Contracts Act makes it clear

that, while the statute carries out the same general policy which the Davis-Bacon Act sought to further, the more recent statute is an extension of the general policy into a new field and subject matter—supply contracts rather than construction contracts. It must be assumed that Congress intended the provisions of the Public Contracts Act to be suitable and appropriate in this new field. Consequently, if a more flexible and variable geographic unit for wage determinations is necessary in order that the general policy may be carried out in the new field, the language should be construed so as to authorize the designation of "localities" of any dimensions appropriate under particular circumstances in the administration of the Act. And, as we will now show, such flexible units *are* necessary in the field of supply contracts.

While the Public Contracts Act is an application of the same policy which underlies legislation of the Davis-Bacon type, the crucial differences in the means appropriate to the application of that general policy arise from the completely different characteristics of construction contracts and supply contracts and the completely different character of some of the *specific* evils (as distinguished from the *general* evil of substandard wages) sought to be dealt with by the two types of legislation.

There is but one possible place of performance of a construction contract. Such a contract must be performed at the site selected in advance of the award of the contract. For this reason, the place

where the work is to be performed on such a contract is ascertainable with precision. And since wage rates prevailing at the site can only be threatened by the competition of cheaper labor engaged at the site of construction, the wage rates prevailing at the one possible place of performance can be protected and the practices which threaten those rates can be suppressed by requiring all bidders, wherever situated, to conform to the standard prevailing at the one possible place of performance.[8]

Since there are as many possible places of performance of a supply contract as there are different bidders for the contract, in advance of the award of such a contract the "locality in which the materials * * * are to be manufactured * * *" is *prima facie* as broad as the area within which all of the possible bidders are located. And the protection of wages in the area or locality within which a supply contract is to be performed requires a uniform wage standard throughout the geographical area within which low wages could otherwise operate to confer decisive competitive advantage on the low-wage bidder. Reference to some of the more flagrant industrial practices which were encouraged by the unrestricted operation of the low-bidder statute, R. S. § 3709, and which Congress

[8] The simple pattern of practices which Congress sought to suppress by the Bacon-Davis Act is shown by the extracts from the Congressional debates printed in Appendix D. *infra*, pp. 57–64.

sought to suppress in the competition for government supply contracts, has already been made.[9] The most cursory examination of the sweatshop evil will demonstrate the impossibility of combating it by the establishment of a separate prevailing wage standard for each of the numerous "communities" or "local centers of manufacture" in which the plants of a particular industry are located. Sweatshop or substandard wage plants are frequently located in isolated, rural centers far from the plants of competitors. The determination of the prevailing minimum wage for each local center of manufacture would merely place the stamp of approval on sweatshop rates and would not only perpetuate them in the plants where they exist but would encourage their spread to competing firms.[10] Such a procedure would frustrate the objectives of this Act just as the objectives of the Davis-Bacon

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[9] *Supra*, pp. 106-112.

[10] Respondents have argued (Br. in Opp. p. 29) that the inclusion in Section 1 (b) of the alternative bases of "similar work" and "similar industries or groups of industries" in addition to the "particular industry" are meaningless except when viewed as alternatives to be ultilized when there is but a single plant of a particular industry in a small local center of manufacture, and that these alternatives must therefore have been included *because* locality denotes an intrinsically small area. But it seems clear that these alternative bases were included to enable the Secretary of Labor to meet the situation in which an entire industry or an extensive portion of an entire industry is affected with sweatshop wage conditions. In such situations the "particular industry" standard of minimum wages is inappropriate to the accomplishment of the Congressional purpose.

Act would be frustrated by requiring each bidder on a construction contract to pay, instead of the wages prevailing where the contract is to be performed, whatever wages prevailed in the community in which the bidder's principal office is located.

Likewise, the facts concerning the "runaway shop" evil are sufficient to indicate that the establishment of a separate prevailing wage for each center of manufacture would merely operate to encourage migration to a lower wage center of manufacture. Effective elimination of the competitive advantages of this practice can only be accomplished by making it unprofitable for industry to migrate solely for the purpose of achieving low wage costs.

The precise boundaries of the area within which it is possible to say that a particular supply contract is to be performed will depend upon the peculiar facts of each industry. Certain industries, such as the linoleum industry, are composed of very few manufacturing plants and it is conceivable that an isolated plant might not compete with others and might, therefore, constitute the sole plant within a locality in which materials are to be manufactured under certain contracts.[11] In other industries, transportation costs may be so great a fraction of the delivered cost as greatly to restrict

[11] In the linoleum industry, there are only four producing plants, one in Lancaster, Pa., one in Kearny, N. J., one in Trenton, N. J., and one in Emeryville, California. See U. S.

the competitive radius of any one plant or cluster of plants.

Other industries present characteristics of geographic diffusion as striking as the concentration in the linoleum industry. The 2,193 mills of the Flour and Grain Products Industry [12] are distributed throughout every state of the Union and one or more plants is to be found in 1,129 of the 2,053 counties in the country.[13]

Thus, the industries for which the Secretary must make minimum wage determinations range from those which are extremely concentrated to

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Bureau of the Census, Biennial Census of Manufactures, 1935, p. 240. No study of the linoleum industry has been made for the determination of minimum wages under the Public Contracts Act, but it is probable, as to any contract to supply linoleum to Government offices in the far west, that the contract will be performed in Emeryville, California. But even so, it is not certain that a determination of prevailing wages in the linoleum industry for a locality consisting of the city of Emeryville alone would fully accomplish the purposes of the Act. Such a determination might merely operate to encourage migration of the Emeryville linoleum plant to some other place for which no prevailing wage had been determined. In the light of this factor, therefore, it might be proper to determine the prevailing minimum wage for a larger area. In any case, the facts of the linoleum industry suggest the type of industrial facts which may, in proper cases, provide the basis for a determination that the materials called for by certain contracts "are to be manufactured" within a very small area.

[12] U. S. Bureau of the Census, Biennial Census of Manufacturers, 1935, p. 135.

[13] U. S. Department of Commerce "Industrial Market Data Handbook of the U. S." Domestic Commerce Series, No. 107, 1939, pp. 134–815.

those which are spread throughout the nation. By virtue of this, the Secretary's determination of the "locality in which the materials * * * are to be manufactured" must range from the extremely small communities, which the court below envisaged, to the entire nation. But, even in cases where manufacturers are diffused throughout the nation, it does not follow that the locality determined by the Secretary must be the entire nation. Transportation costs may limit the effective marketing area. Other economic characteristics may reveal fairly well-defined competitive areas within the industry, and that contracts for delivery in one area will probably be confined to bidders whose plants are situated in that area, while competition for the delivery to another part of the country will be confined to bidders situated in another (and perhaps partially overlapping) area.

The variety of industrial situations to which the statutory scheme must accommodate itself sufficiently indicates that it is not only impossible in most cases to determine the local center of manufacture in which a particular supply contract will be performed, but that the determination of a separate minimum wage standard for each local center of manufacture would foster rather than suppress the very practices which Congress sought to discourage, and defeat the objectives of the statute.

The court below wholly failed to take account of the competitive areas involved in Government sup-

ply contracts. It recognized that the deliberate substitution of "locality" (in the Public Contracts Act) for the "municipal subdivision" unit (in the Davis-Bacon Act) was not without significance. But the court did not comprehend the significance which it noted.[14] As we have shown, the significance is found in the inherent difference between construction contracts which are let with a single fixed site in contemplation, and supply contracts, the site of the performance of which cannot be ascertained in advance, and in the consequences which flow from that inherent difference. Because of its failure to appreciate the purposes sought to be achieved by the Act and the character of the evils which were sought to be suppressed, the court below relied upon certain remarks[15] made in the general

[14] The court thought the change was purely for the purpose of allowing the unit to overlap municipal boundaries (R. 392–93). But such overlap might be just as necessary under the Davis-Bacon Act.

[15] A footnote to the opinion shows that reference was made to the following language (Congressional Record, Vol. 80, Part 9, 74th Cong., 2d Sess.):

"Mr. GREENWOOD. Mr. Speaker, this resolution from the Committee on Rules provides for consideration of what is known as the Walsh-Healey bill, which bill regulates specifications in connection with the purchase of supplies by the Government of the United States. It provides that no less than the prevailing minimum wage shall be paid to workers in the community where the supplies are manufactured or where the work is performed" [at p. 9992].

"Mr. GREENWOOD. This bill provides that they shall pay the prevailing wages in the community where the work is

debate in the House of Representatives which were thought to show that Congress specifically intended that the Secretary of Labor should determine different minimum wage standards for each "community" or "local center of manufacture" (R. 394).

It should be noted that the Court below departed from well established principles of statutory construction in its treatment of the debate. It is ap-

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performed; so the bill takes care of the very proposition of which the gentleman speaks" [at page 9993].

"Mr. CITRON. The bill before us is in substance an extension of the Bacon-Davis Act to all Government purchases amounting to over $10,000 * * *. The bill merely provides that the Government shall have the right to refuse the bids on all purchases over $10,000 to those * * * (4) who pay less than the prevailing rate of wages in their community" [at page 10008].

"Mr. HEALEY. That is an administrative problem. As I view it, the prevailing wage is already a fact which already exists. The Secretary's duty is simply to inquire and ascertain what that prevailing wage is" [at page 10003].

"Mr. WALTER. If there is any grave differences of opinion with respect to any portion of this bill it certainly comes with respect to the possibility, if you please, of the Secretary of Labor fixing wages. There is no Member of this House any more opposed to that idea than I am. I say to you frankly that I would not have voted to report such a bill, but there is nothing in this measure that gives to anyone in any executive branch any authority to fix wages. We have had no difficulty in determining what the prevailing rates of wages are under the Bacon-Davis Act. It has been a comparatively simple matter to go into each community in which Government buildings are being constructed, and determine what every particular artisan is paid in that community. The problem is the same here" [at page 10004].

parent that the court actually relied upon the statements of Representatives Greenwood, Citron, and Walter to show the interpretation which Congress intended to be placed on the word "locality." For this purpose, the general debate may not be relied upon. *Wright* v. *Vinton Branch,* 300 U. S. 440, 464; *Humphrey's Executor* v. *United States,* 295 U. S. 602, 605; *Federal Trade Commission* v. *Raladam Co.,* 283 U. S. 643, 651. Only the sponsor (*Richbourg Motor Co.* v. *United States,* 281 U. S. 528, 536, referring to Cong. Record, Vol. 58, Part 3, p. 2902) and the person in charge of the bill on the floor (*Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, 474–5) are competent to make authoritative statements with reference to the meaning of particular words. The statements of an ordinary member of the committee which reported the bill are not evidence of the meaning of the language. *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 493–4 (referring to Cong. Record, Vol. 61, Part 7, p. 7071–5).

The only member of the House of Representatives whose remarks are competent to show the meaning of the particular word *locality* was Representative Healey, whose name the bill bore and who was in charge of the measure on the floor. But his remarks lend no support to the view that Congress specifically intended to confine the locality unit to small areas such as metropolitan centers. He refers to "industries operating in the locality"

(Cong. Rec., Vol. 80, Part 9, p. 10002), and to a specific question as to how prevailing minimum wages in a specific town in Iowa would be determined, he replied: "The prevailing wage will be determined for the general locality." *Id.*, p. 10023.

As for the particular remarks upon which the court below erroneously relied in construing "locality," there would be no reason, even if the remarks were a valid source for determining Congress' intent in employing that word, to give them any substantial weight. Representative Greenwood's remarks were made as a member of the Rules Committee, in presenting the resolution calling up S. 3055, which he attempted to describe, but described inaccurately. From the comments of Representatives Citron and Walter, both members of the Judiciary Committee, the court below drew an erroneous inference. It is perfectly clear that these comments were merely intended to make clear that the revised bill, like the familiar Davis-Bacon Act, embodied a *prevailing* wage standard, rather than the highly controversial and discretionary standard of the original bill which authorized minimum wages fairly commensurate with the value of the services rendered.[16]

[16] This controversy was fresh in the minds of the committeemen since it had occupied the attention of the members since the hearing of the bill on March 23 up until June 5, 1936, when the bill was reported. Not until the proponents had agreed to amend the bill in this respect had

Furthermore, if precedent is to be broken in this case by looking to the general debates for light on the intended meaning of a particular word, the most significant remarks were overlooked by the court below and are ignored by the respondents. The most considered references to "locality" were made by an opponent of the bill, Representative Michener, also a member of the Judiciary Committee, who carefully pointed out during the debate that, in adopting "locality" as the geographic unit, an important departure had been made from the Davis-Bacon Act, and who opposed the necessarily far broader discretion in determining the unit which was thereby conferred upon the Secretary of Labor.[17] The sponsors of the bill did not dispute Representative Michener's analysis.

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they been able to muster a sufficient majority in the full committee to secure favorable action on the proposed legislation. It is apparent, moreover, that the analogy drawn by Representative Citron to the Davis-Bacon Act, which was quoted by the court, sheds no light on the meaning of "locality" since immediately after the words quoted, he went on to say:

"I frankly confess that I am worried about the textile industry of my State. I am worried because firms are moving to foreign fields, like Canada, or to other sections where they can take advantage of low-standard wages" (id. 10009).

It is obvious that the maintenance of the wages prevailing in the communities in which these textile firms are located could not be achieved by limiting the area within which a uniform standard of wages is applied to these communities themselves. Such a limitation would merely stimulate migration to lower wage centers.

[17] 80 Cong. Rec., pt. 9 (74th Cong., 2d Sess.), p. 10006:

"* * * It permits the Secretary of Labor, Mme. Per

The foregoing analysis of the legislative history also disposes of respondents' contention that the Act gave the Secretary "no authority to fix wages." If this argument means simply that the Act confers no power to raise wages generally, the Government readily concedes the point. Comment has already been made on the fact that Congress adopted the standard of ascertainable "prevailing" wages in lieu of a standard based on fairness or reasonableness. If respondents really mean, however, that the Act left the Secretary of Labor powerless to do anything else than to freeze the *status quo*, the

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kins, to determine what the prevailing minimum wages are in the locality in which the materials are to be manufactured or furnished. No formula is set up to be followed by the Secretary of Labor. It is fair to presume, therefore, that she will take into consideration such factors as she thinks advisable. There is no definition of the word 'locality,' although the committee spent much time on this word, because this is most important. If some of the proponents of this bill had their way, there would be a uniform wage for uniform factory work all over the United States. Others suggested that the country might be divided into zones and zone minimum wage rates be set up; while others suggested various political subdivisions as the locality.

"The Bacon-Davis Act deals with the construction of public buildings or works only. The prevailing wage in the community must be paid. Where there is a labor organization in the community, the wage fixed by that organization has been accepted by the Secretary of Labor as the prevailing wage. However, the task is not difficult, because the territory is limited to the town, city, or village where the construction is to take place. And it seems to me that this bill should at least contain further limitations, and not leave the entire United States as the locality—limited only by the discretion of the administering officer."

contention clearly cannot be supported, since the determination of a prevailing rate for *any* locality containing wage differentials would cause bidders who did not conform to it either to raise wages to that level or to remain out of the Government contracts market. Since it is conceded that if the boundaries of the localities in the steel determination were properly drawn, the rates determined were indeed the minimum rates prevailing within such localities, the constant reference to the "fixing" of wages confuses rather than clarifies the issue. Particularly is this the case since the Congressional references to wage fixing were made with reference to the difference between the standard provided by the original bill and the revised bill, rather than with reference to the geographical units within which the standard was to be applied.

3. Administrative construction of the Public Contracts Act supports the view that "localities" are not limited to "communities" or other small geographic unit

In the course of two and one-half years of administration of the Public Contracts Act, the Secretary of Labor had issued 22 prevailing minimum wage determinations prior to the issuance of the determination attacked in this case.[18] In none of

[18] Determinations had been made for the following industries prior to that for Iron and Steel: Men's Work Clothing, 2 Fed. Reg. 233; Cotton Garment, 2 Fed. Reg. 1333; Men's Hat & Cap, 2 Fed. Reg. 1335, 3 Fed. Reg. 224; Men's Neckwear, 2 Fed. Reg. 1336; Men's Underwear, 2 Fed. Reg.

these instances had the Act been construed in such a way as to require the application of the prevailing wage standard within small "local centers of manufacture," or "community" units. The approach to the problem of selecting the unit or units within which the application of the uniform prevailing wage standard would most effectively accomplish the legislative objectives of Congress was made in the light of the particular characteristics of each industry. "Localities" as large as or larger than those designated in the present case were commonly designated; in only one (Granite) was a smaller "locality" determined. These determinations affected a wide variety of industries and, as the determination here challenged itself suggested (R. 245), it is reasonable to suppose that if this construction of the Act was repugnant to the Congressional purpose, as the court below suggests it to be, Congress would have acted to alter the construction. *Armstrong Co.* v. *Nu-Enamel Corp.*, 305

1337; Men's Raincoats, 2 Fed. Reg. 1336, 4 Fed. Reg. 4005; Seamless Hosiery, 2 Fed. Reg. 1338; Work Glove, 2 Fed. Reg. 1339; Men's Welt Shoe, 2 Fed. Reg. 2960; Dimension Granite, 2 Fed. Reg. 2976; Handkerchief, 3 Fed. Reg. 64; Barrack Bags & Bandoleers, 3 Fed. Reg. 257; Envelope, 3 Fed. Reg. 889, 1613; Leather & Sheep-lined Jackets, 3 Fed. Reg. 895; Wool & Wool-lined Jackets, 3 Fed. Reg. 896; Vitreous or Vitrified China, 3 Fed. Reg. 901; Flint Glass, 3 Fed. Reg. 1612; Luggage & Saddlery, 3 Fed. Reg. 1153; Wool Carpet & Rug, 3 Fed. Reg. 2371; Fireworks, 3 Fed. Reg. 2370; Tag, 3 Fed. Reg. 2537; Aircraft, 3 Fed. Reg. 3043.

U. S. 315, 330; *Fox* v. *Standard Oil Co.*, 294 U. S. 87, 96; *United States* v. *Shreveport Grain & El. Co.* 287 U. S. 77, 84; *Wisconsin* v. *Illinois*, 278 U. S. 367, 413; *Swendig* v. *Washington Co.*, 265 U. S. 322, 331.

Respondents characterize as disingenuous (Br. in Opp. pp. 11–12) the statements in the Determination that a "narrowly restricted construction of the word "locality" as used in the Act is contrary to the administrative construction consistently adhered to by the Secretary of Labor in the administration of the Act" and that "Reference to the determinations heretofore made in the administration of the Act will disclose a consistent approach to the problem of selection of appropriate units for prevailing minimum wage determinations in the light of the facts of each particular industry" (R. 245). The disingenuity said by respondents to have been "exploded" by the court below is supposed to arise because of the fact that the first determination made under the Act,[18a] that of January 30, 1937, relied upon a legal opinion to the effect that the word "locality" was not intended to designate the unit within which prevailing minimum wages are required to be paid when applied to the "particular or similar industries," and that the word is only intended to designate the unit to be observed when prevailing minimum wages are being determined for "groups of industries."

[18a] Decision of the Secretary of Labor in the Matter of Determination of Prevailing Minimum Wages in the Men's

We do not urge that the Secretary has adopted a consistent legal interpretation of the particular words found in Section 1 (b). That Section, not drawn with notable clarity, is susceptible of both the interpretation adopted in the Men's Work Clothing Determination and that adopted in the present Determination. The important fact to be noted is that under either reading of Section 1 (b) the statute has been construed to permit the division of the country into reasonably broad groupings of plants located in the competitive areas relevant to bidding upon Government contracts. Thus, in the Men's Work Clothing Determination itself, as with certain other industries, the prevailing minimum wage was determined for the entire country. This broad interpretation, as we have shown, is essential if the purposes of the Act are to be accomplished. It is apparent that the more recent interpretation of the Secretary better comports with the statutory language. But the essential thing is that, under either theory, the actual determinations have been wholly consistent, and have uniformly made the areas for which prevailing minimum wages were determined broad enough to accomplish the statutory purpose.

Consequently, it is submitted that the court below was grossly in error in regarding (R. 393–94) the construction which we here urge as having been first adopted forty days prior to the commencement of this suit.

4. Considerations of administrative feasibility likewise show that "locality" is not restricted to small geographic units such as "communities"

That Congress did not intend to require the use of small *local* "centers of manufacture" or "communities" as the geographical unit for application of the prevailing minimum wage standard is also shown by reference to the administrative impracticality of such a procedure. Because of its view that the word "locality" is susceptible of only one limited interpretation, i. e., a very small area synonymous with "place," "vicinity," or "community," the court below disposed of this consideration by stating that questions of administrative convenience and necessity cannot sanction "disregarding the clearly expressed intention of Congress" (R. 393). However, as we have already shown,[19] the word "locality" does not bear any such fixed meaning as the court below supposed. There can, therefore, be no doubt that considerations of the extent to which the various possible constructions of the statutory language will in practice permit administration of the legislation in such a manner as to accomplish rather than frustrate its purposes are relevant aids to construction.[20]

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[19] *Supra*, pp. 93–104.

[20] *Missouri Pacific R. Co.* v. *Holt* (C. C. A. 8), 293 Fed. 155, certiorari denied, 264 U. S. 584; *Red River Broadcasting Co.* v. *Federal Communications Commission* (App. D. C.) 98 F. (2d) 282, 286–287; *Illinois Coal Operators Mutual Employers' Liability Insurance Co.* v. *Chicago, Wilmington and Vermilion Coal Co.*, 217 Ill. App. 625.

The respondents have contended (Br. in Opp. pp. 29–30) that under the Davis-Bacon Act it has proved administratively feasible to make prevailing wage determinations for communities, and that in the iron and steel wage determination here attacked, the Public Contracts Board easily obtained wage data from the iron and steel industry. But these observations do not meet the issue. It is true that the Secretary of Labor has made several thousand determinations of prevailing wages under the Davis-Bacon Act within the cities, towns, and villages in which public construction contracts have been performed. But for the purposes of that Act each contract calls for a determination of the wages prevailing in but *one* city, town, or village. The problem under the Public Contracts Act is quite different. Here it is necessary for the Secretary of Labor to determine the prevailing wages for each of the thousands of local centers of manufacture throughout the country. While this may not present particularly grave problems in geographically concentrated industries such as automobiles, rubber tires, or firearms, or even in industries such as the steel industry, in which the plants are relatively few, it must be remembered that the statutory unit must also accommodate industries in which the plants are numerous and widely diffused. Thus, before the Act could be applied to contracts for the purchase of flour, the Secretary would be required to determine the wages prevailing in the flour industry or simi-

lar industries in each of the local centers of production in which the 2,193 flour mills of the country are located, regardless of the fact that from thousands of these towns no bids whatever might be expected.

When it is remembered that the Public Contracts Act applies not to a single industry, as does the Davis-Bacon Act, but to the whole range of industries whose products are purchased by the Government, the complete dissimilarity of the problems under the two acts becomes apparent. Were the Secretary of Labor required to determine the wages prevailing in each of the many local centers of production in each industry, it would seriously delay the making of wage determinations and postpone for a number of years the full intended effect of the Act. Wage fluctuations would also present an administrative problem.[21] We cannot believe that such a delay would be consistent with the manifestly emergency objective of Congress to control competitive practices affecting wage standards before and not after existing wage structures had been demoralized.

5. Even if this Court disagrees with the construction of "locality" upon which the determination is based, the determination should not be set aside by the courts since the construction is not arbitrary or clearly erroneous.

We believe that we have shown that the Acting Secretary's determination of the *localities* "in which materials * * * are to be manufactured

[21] See Note (1940), 49 Yale L. J. 548, at p. 552.

or furnished * * *" under Government steel supply contracts was based upon a proper construction in the light of the context, purpose, legislative history, and administrative construction of the Public Contracts Act. However, even if this Court should disagree with the construction which we urge, and might come to a different conclusion if the question were presented as an original proposition, that would not be enough to warrant enjoining enforcement of the determination. At the very least, the construction has been shown to be tenable and reasonable, and in no way arbitrary or clearly erroneous.

The courts have consistently ruled that in suits for injunction or mandamus to control the actions of administrative or executive officials, judicial intervention is limited to deciding whether the action was arbitrary, capricious, or palpably erroneous.[22] If the administrative official has been granted authority to construe the terms of the statute delineating his functions or to make rulings of law (as is clearly the case here, since "locality" is not a

[22] *Decatur* v. *Paulding*, 14 Pet. 497, 515; *Gaines* v. *Thompson*, 7 Wall. 347; *Dunlap* v. *Black*, 128 U. S. 40; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324; *Public Clearing House* v. *Coyne*, 194 U. S. 497; *Bates & Guild Co.* v. *Payne*, 194 U. S. 106; *United States ex rel. Ness* v. *Fisher*, 223 U. S. 683; *Houston* v. *St. Louis Ind. Packing Co.*, 249 U. S. 479, 484-5; *Hall* v. *Payne*, 254 U. S. 343; *Interstate Commerce Commission* v. *New York, N. H. & H. R. Co.*, 287 U. S. 178, 203–4; *Work* v. *Rives*, 267 U. S. 175; *Miguel* v. *McCarl*, 291 U. S. 442, 451; *Adams* v. *Nagle*, 303 U. S. 532; *Reichelderfer* v. *Johnson*, 72 F. (2d) 552 (App. D. C.); *Brunswick* v. *Elliott*, 103 F. (2d) 746 (App. D. C.).

mathematically precise word like "acre" or "square mile," his decisions, even in legal matters, will not be overturned unless palpably erroneous.[23] It is never enough, the cases hold, that the court differs from the administrative official as to the correctness of his interpretation or the wisdom of the exercise of his discretion; the error must be so plain as to constitute arbitrary action.

Respondents have attempted to evade the application of these settled doctrines by contending that they are significant only in mandamus actions, and by references to superficially similar cases in which the court *seemed* to substitute its own view of the statute for that of the administrative official.

This rule of administrative finality was first enunciated (*Decatur* v. *Paulding*, 14 Pet. 497) and has perhaps been most consistently applied in mandamus actions, but logic has forced its extension to injunction actions the purpose of which is, as in mandamus, to compel administrative "action" or "nonaction." See, e. g., *Bates & Guild Co.* v. *Payne*, 194 U. S. 106; *Smith* v. *Hitchcock*, 226 U. S. 53; *Adams* v. *Nagle*, 303 U. S. 532. As was said in *Gaines* v. *Thompson*, 7 Wall. 347, 352:

> The doctrine * * * is as applicable to the writ of injunction as it is to the writ of mandamus.

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[23] *Decatur* v. *Paulding*, 14 Pet. 497; *United States ex rel. Ness* v. *Fisher*, 223 U. S. 683; *Hall* v. *Payne*, 254 U. S. 343; *Smith* v. *Hitchcock*, 226 U. S. 53; *Miguel* v. *McCarl*, 291 U. S. 442; *Adams* v. *Nagle*, 303 U. S. 532; *Brunswick* v. *Elliott*, 103 F. (2d) (App. D. C.).

Nor has the court distinguished (if a distinction can really be made) between mandatory injunctions to compel the taking of action which the official declines to take (e. g., *Bates & Guild Co.* v. *Payne,* 194 U. S. 106; *Houston* v. *St. Louis Ind. Packing Co.,* 249 U. S. 479; *Smith* v. *Hitchcock,* 226 U. S. 53) and ordinary injunctions to restrain an officer from taking action said to be contrary to law (e. g., *Gaines* v. *Thompson,* 7 Wall. 347; *Public Clearing House* v. *Coyne,* 194 U. S. 497; *Adams* v. *Nagle,* 303 U. S. 532).

All these classes of cases have deserved and have been given identical treatment.[24] In the absence of the sanction of a statutory method of review, the courts have sought only to keep the actions of the administrative official within the bounds both of reason and of his jurisdiction. The aim of this "common-law" procedure of control by mandamus or injunction is not the correction of reasonable errors, but solely the curbing of arbitrariness.

Of course, in many instances, Congress has treated administrative agencies somewhat as lower courts and has provided statutory methods for reviewing their action. Cf. *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* No. 265, this Term. In such cases, questions of law are

[24] See Note, *Mandatory Injunctions as Substitutes for Writ of Mandamus in the Federal District Courts; A Study in Procedural Manipulation* (1938) 38 Col. L. Rev. 903, for other indications of the identical treatment of mandamus and injunctions.

meant to be left to the courts, and only findings of fact, if supported by substantial evidence, are intended to be conclusive.[25] Likewise, if the administrative agency has no jurisdiction to act under the circumstances, the court will not, of course, accept its views as binding. *Sante Fe Pac. R. R. Co.* v. *Payne*, 259 U. S. 197; *Ickes* v. *Virginia-Colorado Development Corp.*, 295 U. S. 639; *Waite* v. *Macy*, 246 U. S. 606. And if the court, in a distinct proceeding, not involving judicial review of or control over administrative action, is called upon itself to construe a statute, a determination of the administrative tribunal as to the statute's meaning in other and unrelated proceedings is not binding. *Chicago, Mil. & St. Paul Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97.

In a number of cases (on some of which respondents have relied) the error of law was held to be so plain as to be beyond the protection of this facet of the rule of administrative finality. *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Daniels* v. *Wagner*, 237 U. S. 547; *Payne* v. *Central Pac. R. Co.*, 255 U. S. 228,

[25] In this class fall the following cases relied upon by respondents below: *Ann Arbor R. R.* v. *United States*, 281 U. S. 658; *United States* v. *Idaho*, 298 U. S. 105. Also in this class are tax and customs suits against collectors or in the Court of Claims to recover taxes or duties unlawfully collected. *Iselin* v. *United States*, 270 U. S. 245; *Merritt* v. *Welsh*, 104 U. S. 694; *Morrill* v. *Jones*, 106 U. S. 466. This is one statutory method for reviewing the collection of revenue.

234, 238; *Work* v. *Louisiana*, 269 U. S. 250; *Waite* v. *Macy*, 246 U. S. 606. But such, quite evidently, is not the case here.

B. THE IRON AND STEEL WAGE DETERMINATION IS A PROPER APPLICATION OF THE ACT

The respondents in their complaint alleged (R. 27–31) and in the court below argued that the wage determination of the Acting Secretary, even if his definition of "locality" be accepted, was arbitrary and capricious. Their brief in opposition in this Court makes no such argument, although the statement of facts evidences (pp. 10–18) considerable dissatisfaction with the determination. We think it plain that the Public Contracts Act, if it be construed as we have urged, was properly applied in this case.

1. The determination is a legislative rather than a judicial function and, therefore, is not subject to review as to the sufficiency of the evidence

We shall, in the next subsection, indicate that the wage determination is in entire accord with the Act and is fully supported by the evidence. At the outset, however, it should be pointed out that the determination, if reviewable at all, is not subject to a reexamination so precise as contemplated by the respondents below. This is because the determination is a legislative rather than a "quasi-judicial" function.

The Public Contracts Act makes no provision for a hearing prior to a determination of prevailing

minimum wages. In contrast to the violation proceedings contemplated by Section 5,[26] the wage determination to be made by the Secretary under Section 1 (b) is an essentially legislative act dealing with the internal conduct of the business affairs of the Government, in its relation to an entire industry, and is in no sense an order in the nature of a judgment directed against particular individuals. Under these circumstances it was unnecessary to provide notice and hearing. See Fuchs, *Procedure in Administrative Rule Making,* 52 Harv. Law Rev. 259. Certainly no such requirement was imposed.[27]

In fact, the Public Contracts Board has uniformly held hearings before making its recommendations to the Secretary and has uniformly given notice to members of the industry involved.[28] Such

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[26] As we have already shown (*supra*, pp. 51–60), Section 5 deals with proceedings to enforce the Act. These are of a quasi-judicial character and result in orders in the nature of judgments, imposing liability upon particular persons for breach of the contract stipulations required by the Act. These are the "decisions," contemplated by Section 5, which must be "based upon findings of fact [required to be made after notice and hearing], as are deemed to be necessary to enforce the provisions of this Act."

[27] That the Act does not require a hearing in the determination of minimum wages was recognized by the House Committee on the Judiciary in its report on a bill, which failed of passage, to amend the Public Contracts Act. Speaking of the amendment to the prevailing wage section, the committee said: "* * * it embodies the requirement of notice and hearing, a practice which has consistently been followed in the administration of the Act although there

a procedure is plainly a convenient means by which to accumulate data in respect of the prevailing minimum wages. But this, however desirable, practice cannot, of course, serve to convert an essentially legislative investigation into a quasi-judicial proceeding. Nor can it invalidate a determination which would have been valid without hearing or evidence, simply because the evidence which was received is alleged to be inadequate to support the determination. The hearings before the Public Contracts Board are analogous to those before a committee of the Congress; they are helpful to the Secretary, and perhaps indispensable to a wise administration of the Act, but they do not transform an industry-wide investigation into a regulatory proceeding directed against particular individuals.

There is no requirement of the Constitution that hearings be held and the determination supported by evidence adduced therein. The Secretary exercises a delegated legislative authority to ascertain the facts in particular industries; he does not prescribe penalties or regulations for particular persons. Accordingly, neither the Constitution nor "the rudimentary requirements of fair play" (*Morgan* v. *United States*, 304 U. S. 1, 15) fix the

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was no legal requirement to do so * * *." H. Rep. No. 2608, 75th Cong., 3d Sess. (H. R. 6449), p. 5. The same statement was made by the Senate Committee on Education and Labor, reporting on S. 2165, which was similar to H. R. 6449. See Sen. Rep. No. 1810, 75th Cong., 3d Sess., p. 5.

[28] See Report of Attorney General's Committee on Administrative Procedure, the Walsh-Healey Act, pp. 51, 61–63.

character of the investigation the Secretary may undertake; by the same token, there can be no judicial review of the determination nor any requirement that the determination be supported by the evidence introduced at any hearing which might be held. *Norwegian Nitrogen Co.* v, *United States,* 288 U. S. 294, 304–305; *Buttfield* v. *Stranahan,* 192 U. S. 470, 497; *Pacific States Co.* v. *White,* 296 U. S. 176, 185–186; *United States* v. *Chemical Foundation,* 272 U. S. 1, 14–15; *Monongahela Bridge* v. *United States,* 216 U. S. 177, 195; see *The Philadelphia & Trenton R. R. Co.* v. *Stimpson,* 14 Pet. 448, 458; *Martin* v. *Mott,* 12 Wheat. 19, 30. These decisions apply *a fortiori* here. For the wage determination is not a regulatory order but relates simply to the terms upon which the Government will enter into contracts for the purchase of goods from those who choose to bid.

It follows that the allegations of the complaint as to the arbitrary nature of the determination add nothing to respondents' case.[29] Thus, even if this were not legislation governing purely internal governmental affairs, but were regulatory legislation, the validity of the administrative application of the legislative power would not be determinable by ref-

[29] The allegation in the complaint to the effect that the determination is arbitrary and capricious is a mere conclusion of law not admitted by the motion to dismiss. *Silberschein* v. *United States,* 266 U. S. 221, 225; *Aetna Insurance Co.* v. *Hyde,* 275 U. S. 440, 447; *Public Service Commission of Montana* v. *Great Northern Utilities Co.,* 289 U. S. 130, 137.

erence to the evidence adduced at a discretionary hearing but would be valid if any state of facts reasonably could be conceived that would sustain it. *Pacific States Co.* v. *White, supra,* 185. Cf. *United States* v. *Carolene Products Co.,* 304 U. S. 144, 154. *A fortiori,* the administrative exercise of a non-regulatory power of the character here involved is not to be held invalid even should the determination not be supported by the evidence. In a case such as this the test of arbitrariness is simply whether the administrative officer has acted fraudulently, dishonestly, and in bad faith.[30] As stated in *Adams* v. *Nagle,* 303 U. S. 532, pp. 542, 543:

> * * * if a discretion is vested in him, and he is to act in the light of the facts he ascertains and the judgment he forms, a court cannot restrain him from acting on the ground that he has exceeded his jurisdiction by reason of an error either of fact or law which induced his conclusion.
>
> * * * The epithet "arbitrary" used in this connection can mean no more than do the other averments that the Comptroller,

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[30] *Adams* v. *Nagle,* 303 U. S. 532, 542, 543; *United States ex rel. Ness* v. *Fisher,* 223 U. S. 683, 691–693; *United States ex rel. Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316, 324; *McBride* v. *Schurz,* 102 U. S. 378; *Litchfield* v. *Register and Receiver,* 9 Wall. 575; *Gaines* v. *Thompson,* 7 Wall. 347; *United States ex rel. Tucker* v. *Seaman,* 17 How. 224, 230; *Decatur* v. *Paulding,* 14 Pet. 497, 515; *Gillioz* v. *Webb,* 99 F. (2d) 585 (C. C. A. 5th); *Procter & Gamble Co.* v. *Coe,* 96 F. (2d) 518 (App. D. C.); *B. F. Cummins Co.* v. *Burleson,* 40 App. D. C. 500.

> in reaching his conclusion, "committed grave error of law" in failing to regard the contract of February 17 as effective. It would be arbitrary, in the proper sense of the term, for an official to act in the teeth of a statute or stubbornly to refuse to act at all where a statute commands action, but where he essays to exercise the jurisdiction conferred upon him, though his errors may be subject to subsequent correction, they cannot be enjoined as an arbitrary exercise of his authority. To hold otherwise would render orderly administrative procedure impossible.

Respondents have made no suggestion that the determination was not made in good faith. It follows that there can be no judicial reexamination of the accuracy of the Acting Secretary's determination or of the sufficiency of the evidence to support it.

2. The determination is fully supported by the evidence

The respondents' complaint, however, must be dismissed even if the minimum wage determination were fully subject to judicial review. Respondents admit that the report and findings of the Board accurately show the minimum wages paid by the various steel plants, and concede that the objections before the Acting Secretary turned solely upon the construction of Section 1 (b) of the Act (R. 241; Br. in Opp., pp. 10-11). There is, therefore, no question other than the proper demarca-

tion of the localities in which, in advance of the bidding, it may be said that steel products "are to be manufactured" under government steel contracts. Respondents' allegation (R. 30–31) that the record contains no evidence to support the demarcation can mean only that they protest the criteria adopted by the Acting Secretary.

The Public Contracts Board made an elaborate analysis of the comprehensive data which had been submitted to it (R. 48–207). The data showed that well over half of the employees (both total employees and common laborers) were employed in plants where the minimum wage rate was 62.5 cents per hour, and that the minimum rates ranged about this median point from a low of 30 cents to a high of 70 cents (R. 123). To these data, the principles of classification found relevant to this industry were applied. The most significant of these, in the view of both the Board and the Acting Secretary, were the existence of well-defined competitive zones in the industry (R. 180–190), the existence of geographic groupings of plants (R. 156–180), and the existence of distinct minimum wage patterns (R. 164–180). The Board found the market area to be substantially national in extent and concluded that the only significant geographic differences in prevailing minimum wages were to be found between the Northern and the Southern states. Accordingly, the majority recommended a determination of 45 cents for the Southern states and 62.5 cents for

the others (R. 206). While adopting the same criteria (R. 244, 246, 247–251), the Acting Secretary determined that the factor of geographic groupings of plants had received too little emphasis by the Board (R. 247) and divided the Northern states into five groups, which may roughly be described as the Pacific, the Mountain, the trans-Mississippi, the Central, and the Eastern states. The minimum wage determination was 60 cents for the first two localities, 62.5 cents for the last two, and 58.5 cents for the trans-Mississippi states (R. 253–254).

It seems clear that respondents could not successfully attack the determination as arbitrary if the factor of the zone of competition as well as the geographic groupings of plants was legitimately considered by the Acting Secretary. But we have shown that the intention of Congress and the plain purposes of the Act would be frustrated if the area of market competition must be ignored. Indeed, its relevance is graphically shown by the testimony of respondents or their officers. The South Chester Tube Company said (R. 181):

> The products manufactured by the Company are in demand largely in the oil and gas fields of this and foreign countries. The major portion of the Company's output is sold in Texas, California, Oklahoma, Louisiana, Kansas, New Mexico, and West Virginia. The Company is in constant competition at all points with Pittsburgh mills manufacturing similar products.

An officer of the Harrisburg Steel Corporation testified (R. 182):

> that his company did not compete with the Central Iron and Steel Company also in Harrisburg, nor with the Bethlehem plant at Steelton in the neighborhood, but that his company competed with Bethlehem on products manufactured by Bethlehem at other locations.

It seems unlikely that respondents will dispute the large area of competition found in government steel contracts.[31] But it may be well affirmatively to indicate its extent. The report of the Board summarizes and gives illustrative examples of government steel contracts which demonstrate "that the Government requirements for iron and steel are served by plants located in all parts of the country" (R. 184, 185–188). An analysis of 72 steel contracts, totalling $5,015,711.32, awarded by the Navy Department, the War Department, the Panama Canal Zone, and the Bureau of Reclamation of the Department of the Interior during the six months' period immediately preceding the date of this determination[31a] shows conclusively that the locality

[31] See "Report of the Federal Trade Commission to the President in response to Executive Order of May 30, 1934, with Respect to the Basing-Point System in the Iron and Steel Industry," U. S. Government Printing Office, November 1934, pp. 14–18 and *passim*.

[31a] The data is taken from the files of the Public Contracts Division and the Departments involved; a typewritten summary has been filed with the Clerk and submitted to counsel.

in which respondents' plants are located is the smallest possible area within which, in advance of the award of a contract, it can be determined that any contract will be performed.

Thus, on 31 of these contracts, totalling $2,642,595.69, the bidders on each contract were distributed in varying degrees throughout the entire country. The nature of the competition on these contracts indicates that it is not even probable that contracts will be performed in any particular locality smaller than that which embraces all of the plants of the industry. On the remaining 41 of the contracts, totalling $2,373,115.63, all of the bidders on each contract were located either in the locality here challenged (hereinafter referred to as the "northeastern locality") or in the locality immediately to the west (hereinafter referred to as the "midwestern locality"), in which the prevailing minimum wage is also 62.5 cents per hour.

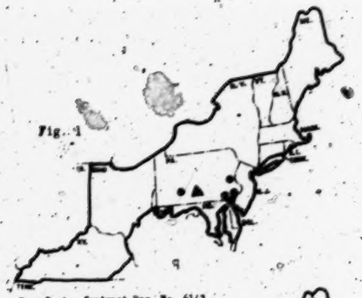
On 16 of the last-mentioned group of contracts, totalling $335,534.29, all of the bidders on each contract were located within the northeastern locality. As is shown on the map FIRST FACING ~~on the preceding~~ page, the competition among bidders located throughout this locality is general. The phenomenon of "alternative bidding" indicated on several of the contracts depicted brings home the fact that no area less extensive than this smallest discernible area of bidders would be appropriate to the accomplishment of the purposes of the Act. In Figures 2, 3, 4, 5, 6, 7, 8, 12, and 15, on this map, the connection of

two or more points by a line indicates that a particular bidder stated in his bid that, if awarded the contract, steel would be supplied from any or all of the connected plants. Thus, even after the award of the contract, the place of performance might be determinable at the option of the lowest bidder. In the case of the contract depicted in Fig. 8, for example, had the Bethlehem Steel Company, of Bethlehem, Pennsylvania, been awarded the contract, the materials would have been manufactured either in Johnstown or Lebanon, Pennsylvania, or both; had another bidder, the Enterprise Galvanizing Company, of Philadelphia, Pennsylvania, been awarded the contract, the materials would have been manufactured either in Philadelphia or Pittsburgh, Pennsylvania or both; had the Ross Galvanizing Works, Inc., of Brooklyn, New York, been awarded the contract, the materials would have been manufactured either in Brooklyn, New York, or Pittsburgh, Pennsylvania, or both. Clearly, the Congressional objective of rewarding rather than penalizing the high wage manufacturer can only be accomplished by the determination of the uniform minimum wage prevailing throughout an area in which it is realistically possible to say that the "materials * * * are to be manufactured" and within which the payment of less than the uniform minimum standard may attract the place of actual performance away from the fair wage standard employer.

The map on the opposite page indicates the nature and scope of the competition on the 25 contracts on each of which the bidders were distributed throughout both the northeastern and the midwestern localities. Here, again, the prevalence of alternative bids strongly suggests the necessity of treating the entire area as a "locality" within which, in advance of the bidding, it is possible to say that a given contract will be performed.

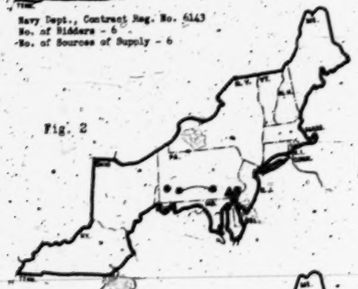
We have, then, a situation in which the iron and steel industry on many occasions competes for government contracts throughout the national area and, on numerous other occasions, competes for government contracts throughout more restricted areas. The problem faced by the Acting Secretary and by the Board in making its recommendation was the delineation, under Section 1 (b), of "the locality in which the materials * * * are to be manufactured or furnished." Under one view, the Acting Secretary would have been wholly justified in describing the entire country as the locality in which the materials are to be furnished. On the other hand, the evidence before the Board indicated that many government contracts for iron and steel were filled from more restricted regions (R. 187–188). The Acting Secretary resolved this problem by grouping the iron and steel plants into what he found to be fairly well defined geographical areas. This grouping was checked by examination of the wage patterns within the geographic areas. So arranged, he found a reasonable homo-

Fig. 1



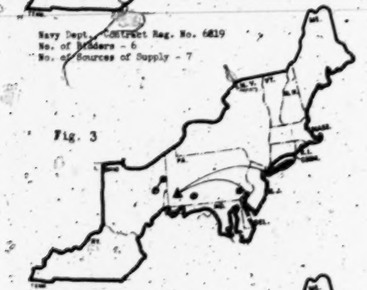
Navy Dept., Contract Reg. No. 6143
No. of Bidders - 6
No. of Sources of Supply - 6

Fig. 2



Navy Dept., Contract Reg. No. 6819
No. of Bidders - 6
No. of Sources of Supply - 7

Fig. 3



Navy Dept., Contract Reg. No. 6842
No. of Bidders - 10
No. of Sources of Supply - 13

Fig. 4

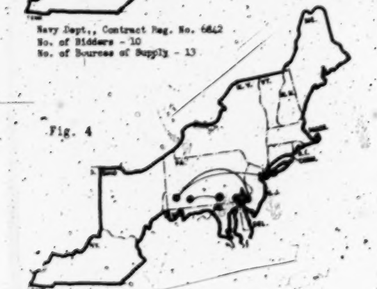
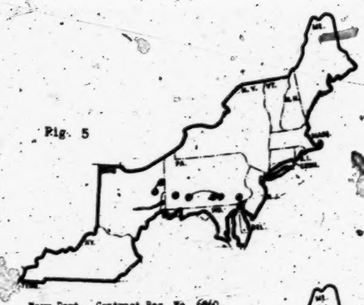
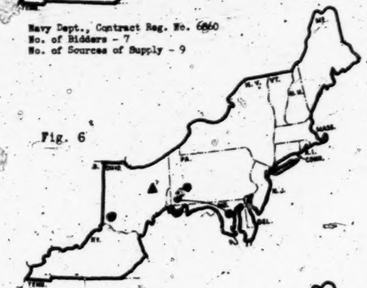


Fig. 5



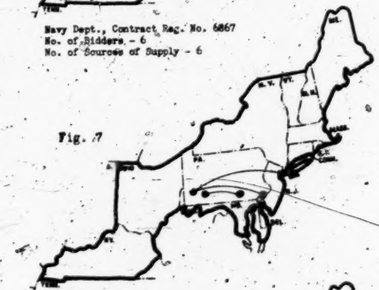
Navy Dept., Contract Reg. No. 6860
No. of Bidders - 7
No. of Sources of Supply - 9

Fig. 6



Navy Dept., Contract Reg. No. 6867
No. of Bidders - 6
No. of Sources of Supply - 6

Fig. 7



Navy Dept., Contract Reg. No. 6952
No. of Bidders - 8
No. of Sources of Supply - 10

Fig. 8

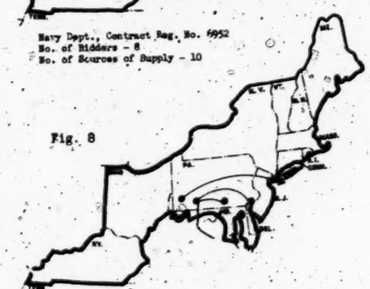
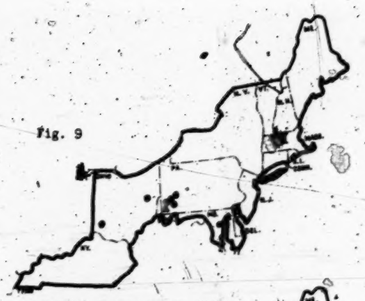
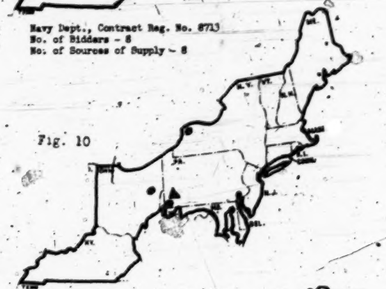


Fig. 9



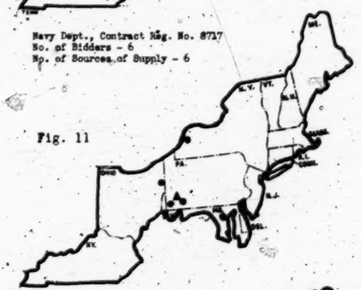
Navy Dept., Contract Reg. No. 8713
No. of Bidders - 8
No. of Sources of Supply - 8

Fig. 10



Navy Dept., Contract Reg. No. 8717
No. of Bidders - 6
No. of Sources of Supply - 6

Fig. 11



War Dept., Contract Reg. No. 7376
No. of Bidders - 9
No. of Sources of Supply - 9

Fig. 12

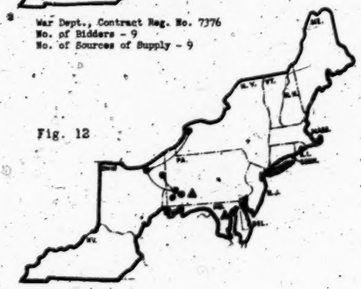
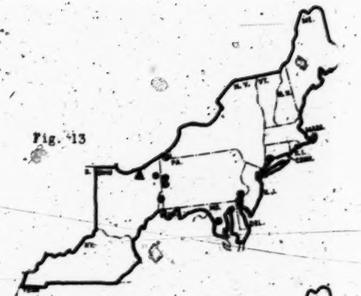
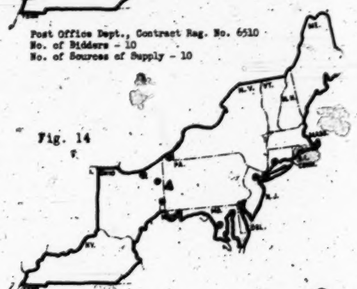


Fig. 13



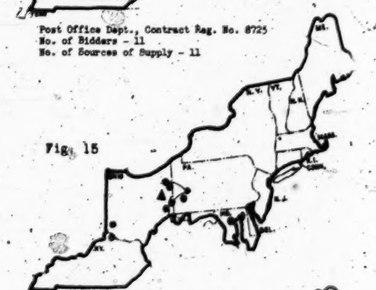
Post Office Dept., Contract Reg. No. 6510
No. of Bidders - 10
No. of Sources of Supply - 10

Fig. 14



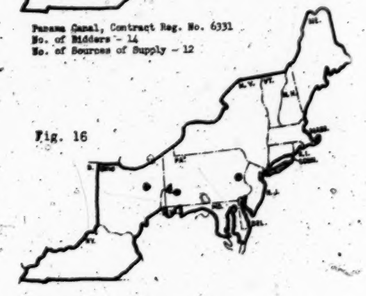
Post Office Dept., Contract Reg. No. 8725
No. of Bidders - 11
No. of Sources of Supply - 11

Fig. 15



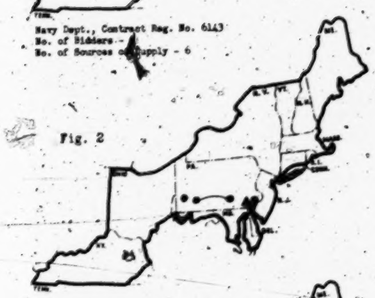
Panama Canal, Contract Reg. No. 6331
No. of Bidders - 14
No. of Sources of Supply - 12

Fig. 16



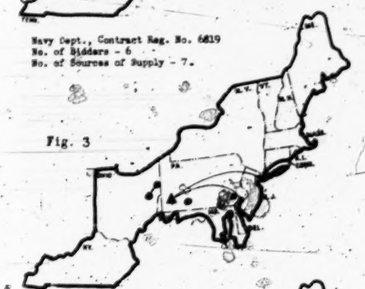
Navy Dept., Contract Reg. No. 6143
No. of Bidders - 6
No. of Sources of Supply - 6

Fig. 2



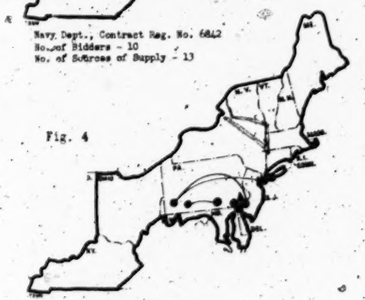
Navy Dept., Contract Reg. No. 6819
No. of Bidders - 6
No. of Sources of Supply - 7

Fig. 3



Navy Dept., Contract Reg. No. 6842
No. of Bidders - 10
No. of Sources of Supply - 13

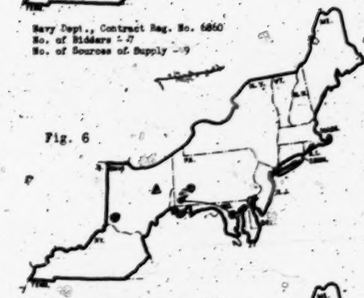
Fig. 4



Navy Dept., Contract Reg. No. 6858
No. of Bidders - 13
No. of Sources of Supply - 14

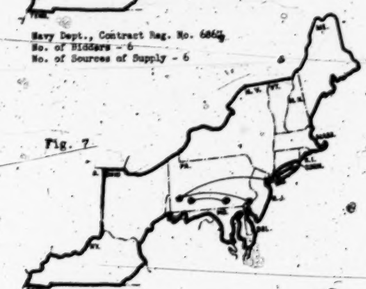
Navy Dept., Contract Reg. No. 6860
No. of Bidders - 7
No. of Sources of Supply - 9

Fig. 6



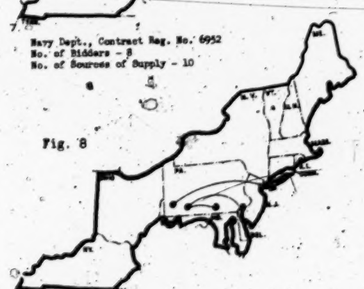
Navy Dept., Contract Reg. No. 6867
No. of Bidders - 6
No. of Sources of Supply - 6

Fig. 7



Navy Dept., Contract Reg. No. 6952
No. of Bidders - 8
No. of Sources of Supply - 10

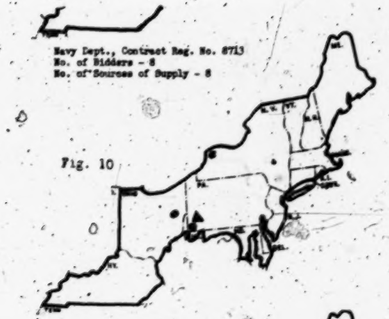
Fig. 8



Navy Dept., Contract Reg. No. 6953
No. of Bidders - 8
No. of Sources of Supply - 10

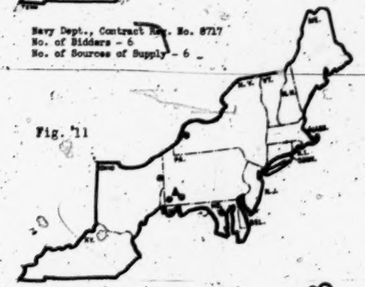
LEGEND

4-Sources of supply of successful bidders.
4-Sources of supply of other bidders
Interconnecting lines indicate alternative sources of supply.



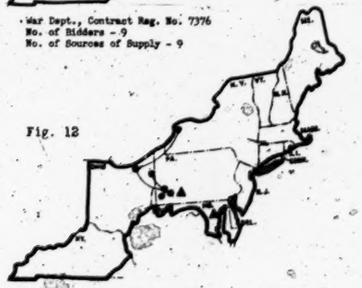
Navy Dept., Contract Reg. No. 8713
No. of Bidders - 8
No. of Sources of Supply - 8

Fig. 10



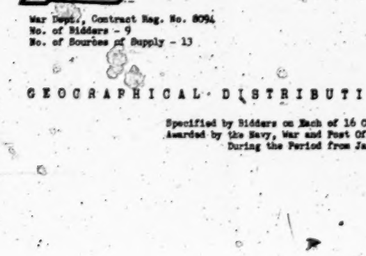
Navy Dept., Contract Reg. No. 8717
No. of Bidders - 6
No. of Sources of Supply - 6

Fig. 11

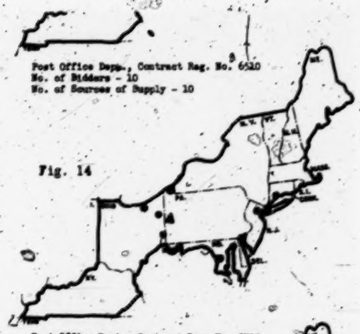


War Dept., Contract Reg. No. 7376
No. of Bidders - 9
No. of Sources of Supply - 9

Fig. 12

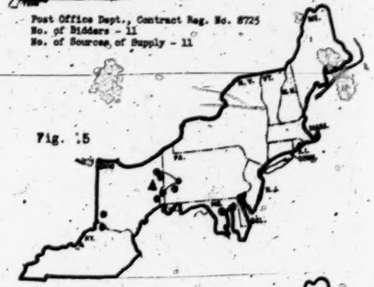


War Dept., Contract Reg. No. 8094
No. of Bidders - 9
No. of Sources of Supply - 13



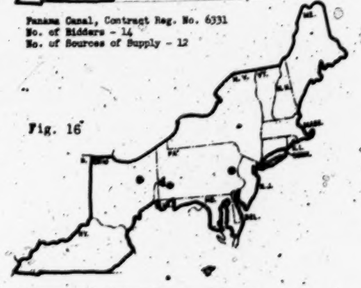
Post Office Dept., Contract Reg. No. 6520
No. of Bidders - 10
No. of Sources of Supply - 10

Fig. 14



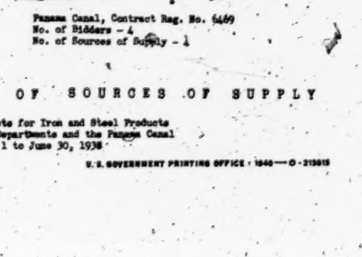
Post Office Dept., Contract Reg. No. 8725
No. of Bidders - 11
No. of Sources of Supply - 11

Fig. 15



Panama Canal, Contract Reg. No. 6331
No. of Bidders - 14
No. of Sources of Supply - 12

Fig. 16



Panama Canal, Contract Reg. No. 6469
No. of Bidders - 4
No. of Sources of Supply - 4

GEOGRAPHICAL DISTRIBUTION OF SOURCES OF SUPPLY

Specified by Bidders on Each of 16 Contracts for Iron and Steel Products
Awarded by the Navy, War and Post Office Departments and the Panama Canal
During the Period from January 1 to June 30, 1938

U. S. GOVERNMENT PRINTING OFFICE : 1940 — O - 215815

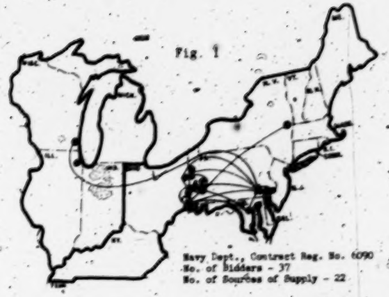


Fig. 1

Navy Dept., Contract Reg. No. 6090
No. of Bidders - 37
No. of Sources of Supply - 22

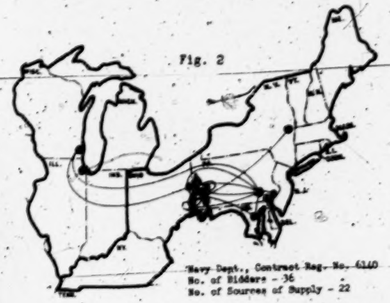


Fig. 2

Navy Dept., Contract Reg. No. 6140
No. of Bidders - 36
No. of Sources of Supply - 22

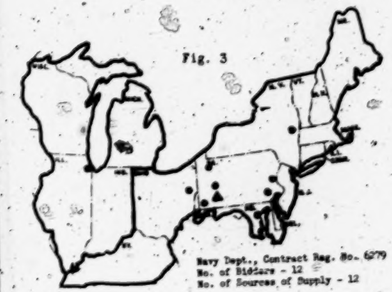


Fig. 3

Navy Dept., Contract Reg. No. 6279
No. of Bidders - 12
No. of Sources of Supply - 12

Fig. 4

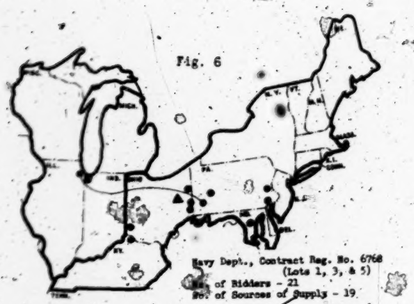


Fig. 6

Navy Dept., Contract Reg. No. 6768
(Lots 1, 3, & 5)
No. of Bidders - 21
No. of Sources of Supply - 19

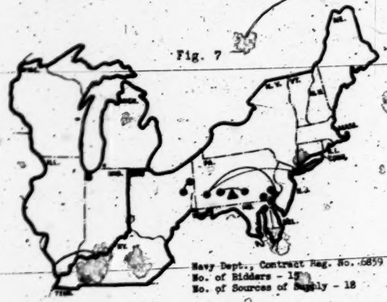


Fig. 7

Navy Dept., Contract Reg. No. 6859
No. of Bidders - 15
No. of Sources of Supply - 18

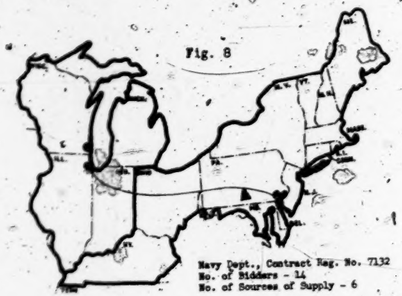


Fig. 8

Navy Dept., Contract Reg. No. 7132
No. of Bidders - 14
No. of Sources of Supply - 6

Fig. 9

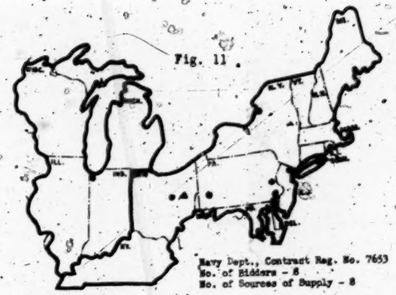


Fig. 11

Navy Dept., Contract Reg. No. 7653
No. of Bidders - 8
No. of Sources of Supply - 8

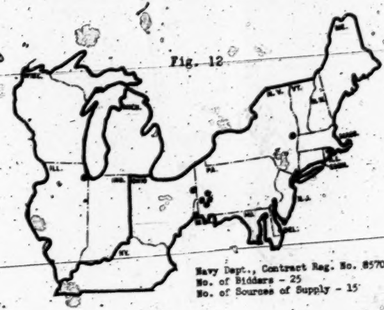


Fig. 12

Navy Dept., Contract Reg. No. 8570
No. of Bidders - 25
No. of Sources of Supply - 15

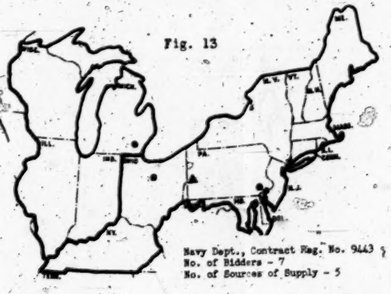


Fig. 13

Navy Dept., Contract Reg. No. 9443
No. of Bidders - 7
No. of Sources of Supply - 5

Fig. 14

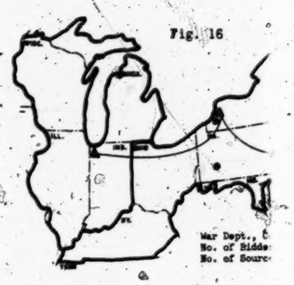


Fig. 16

War Dept., C
No. of Bidde
No. of Source

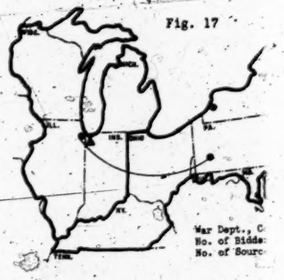


Fig. 17

War Dept., C
No. of Bidde
No. of Sourc

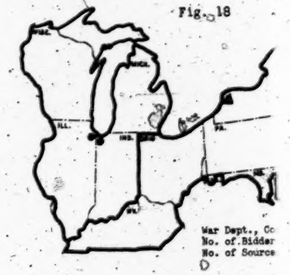


Fig. 18

War Dept., Co
No. of Bidder
No. of Source

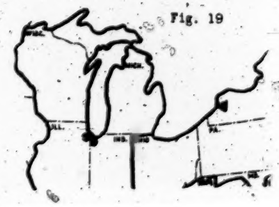
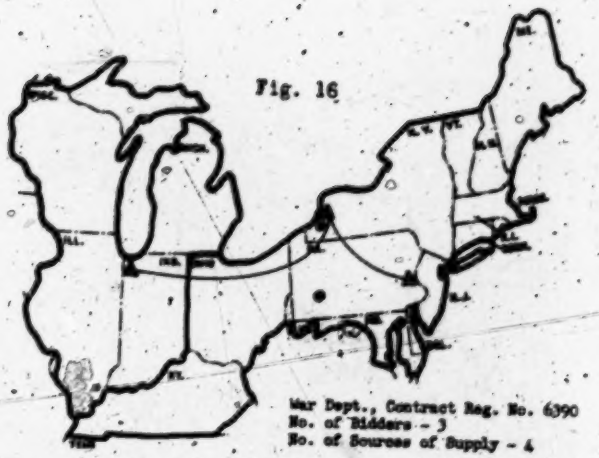


Fig. 19

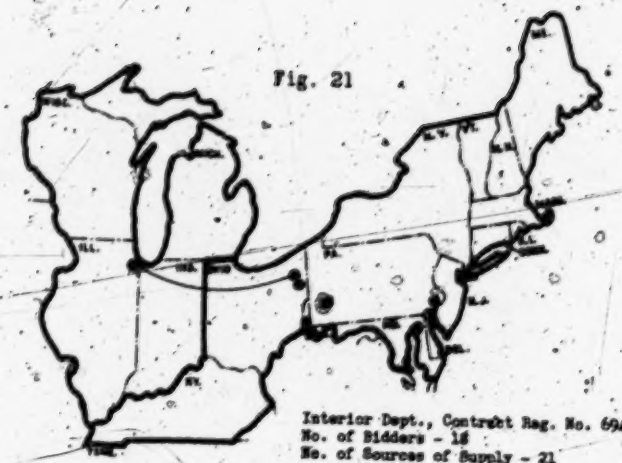
, Contract Reg. No. 7653
dders - 8
urces of Supply - 8

Fig. 16



War Dept., Contract Reg. No. 6390
No. of Bidders - 3
No. of Sources of Supply - 4

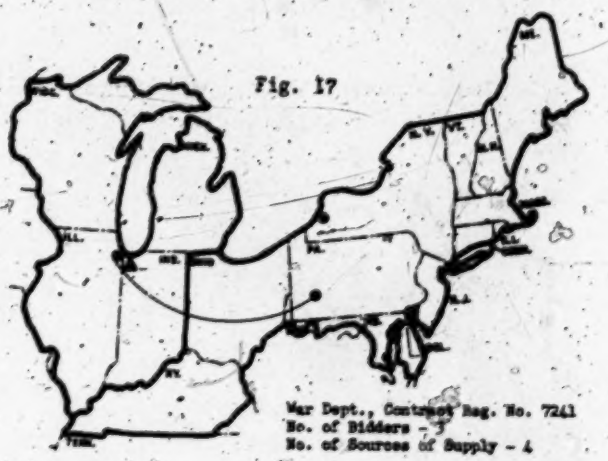
Fig. 21



Interior Dept., Contract Reg. No. 6941
No. of Bidders - 18
No. of Sources of Supply - 21

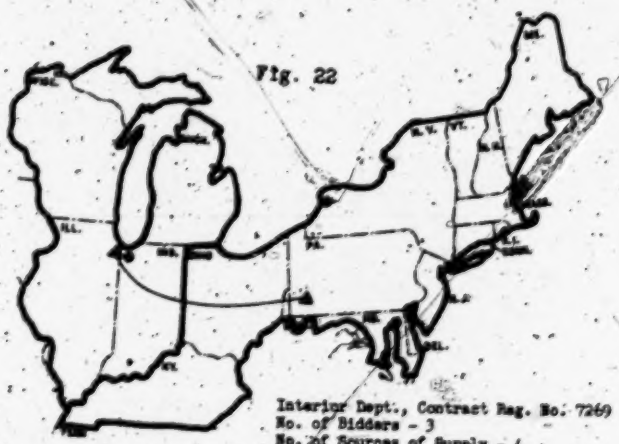
, Contract Reg. No. 8570
dders - 25
urces of Supply - 15

Fig. 17



War Dept., Contract Reg. No. 7241
No. of Bidders - 3
No. of Sources of Supply - 4

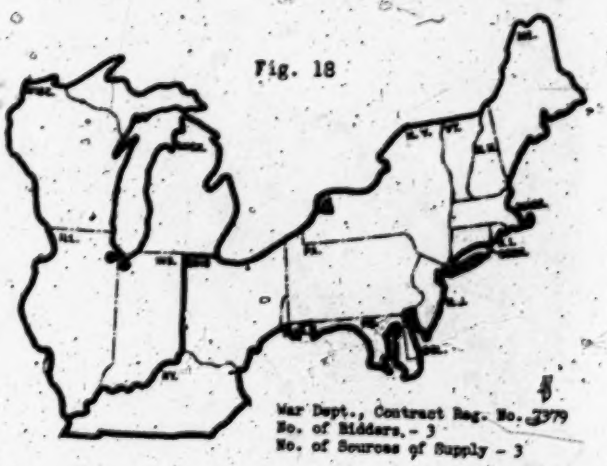
Fig. 22



Interior Dept., Contract Reg. No. 7269
No. of Bidders - 3
No. of Sources of Supply - 4

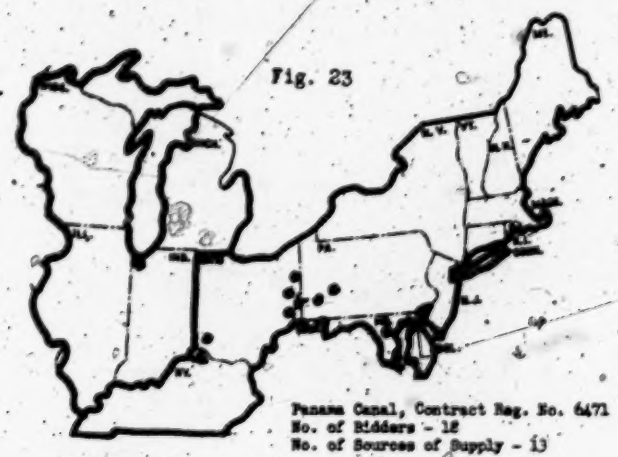
Contract Reg. No. 9443
ers - 7
ces of Supply - 5

Fig. 18



War Dept., Contract Reg. No. 7379
No. of Bidders - 3
No. of Sources of Supply - 3

Fig. 23



Panama Canal, Contract Reg. No. 6471
No. of Bidders - 12
No. of Sources of Supply - 13

Fig. 19

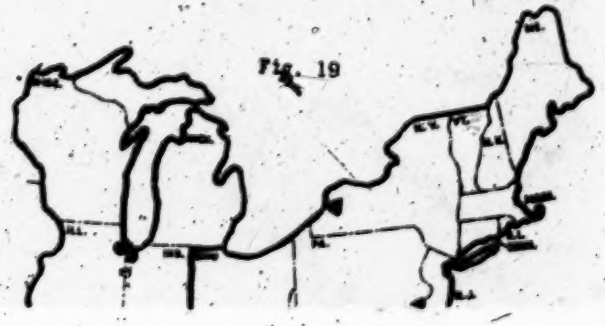


Fig. 24

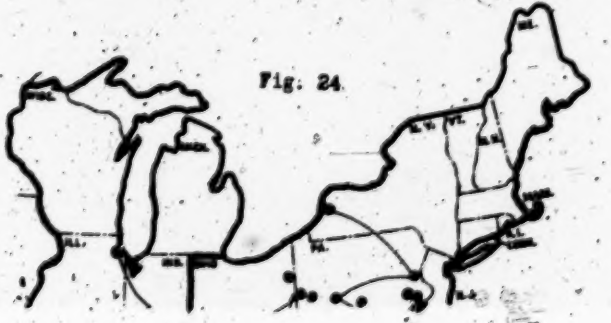
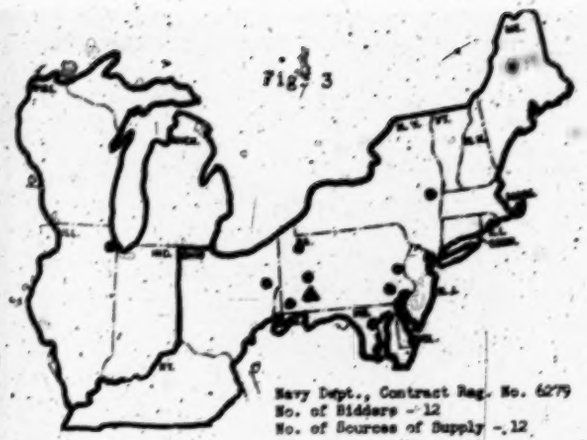
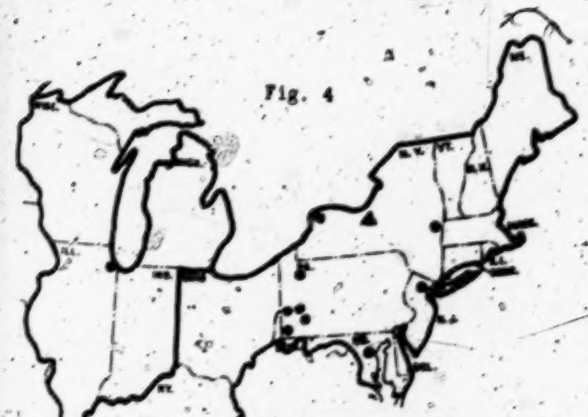


Fig. 3



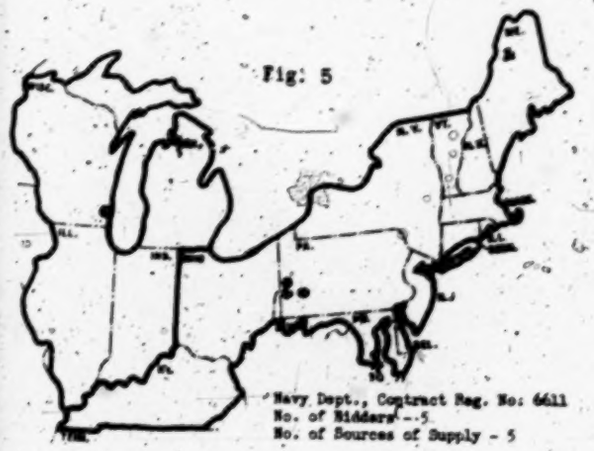
Navy Dept., Contract Reg. No. 6279
No. of Bidders - 12
No. of Sources of Supply - 12

Fig. 4



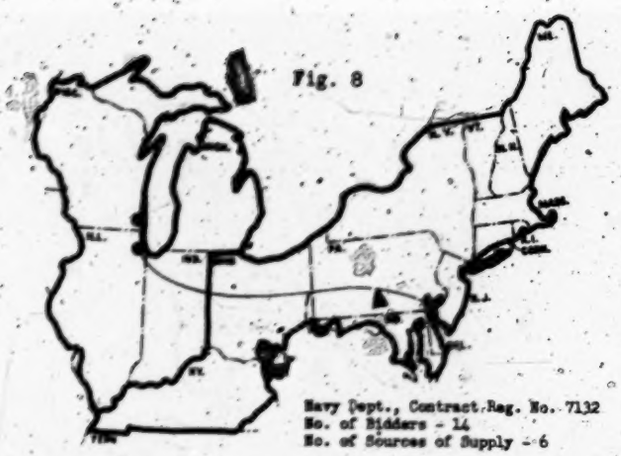
Navy Dept., Contract Reg. No. 6575
No. of Bidders - 12
No. of Sources of Supply - 12

Fig. 5



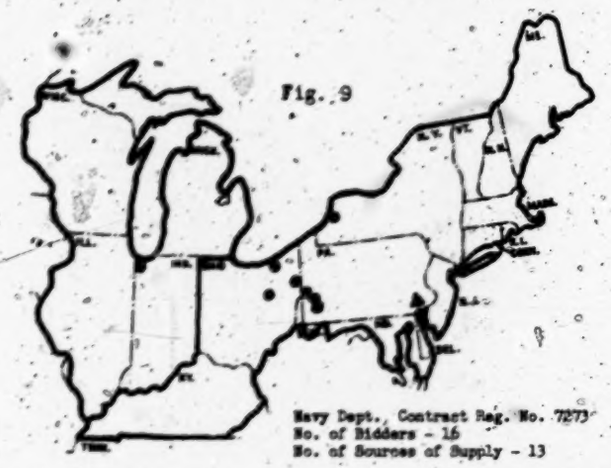
Navy Dept., Contract Reg. No. 6611
No. of Bidders - 5
No. of Sources of Supply - 5

Fig. 8



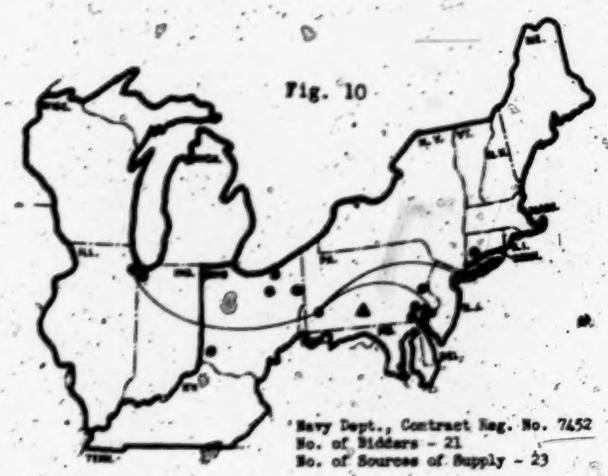
Navy Dept., Contract Reg. No. 7132
No. of Bidders - 14
No. of Sources of Supply - 6

Fig. 9



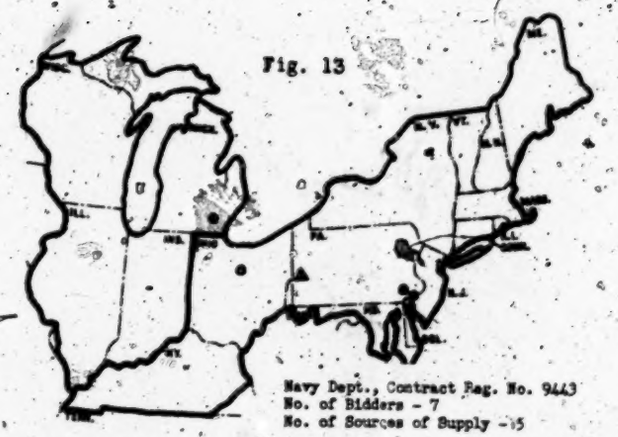
Navy Dept., Contract Reg. No. 7273
No. of Bidders - 16
No. of Sources of Supply - 13

Fig. 10



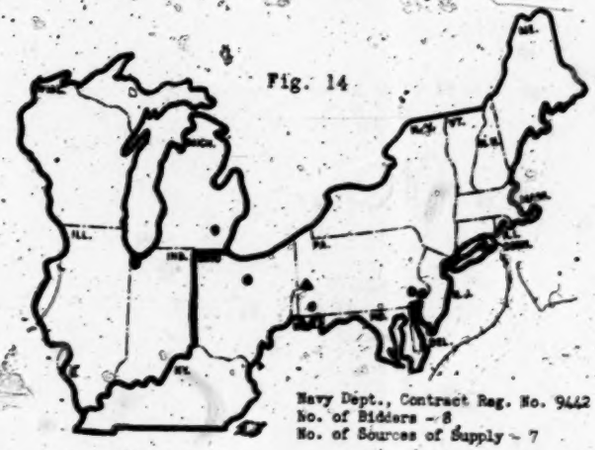
Navy Dept., Contract Reg. No. 7452
No. of Bidders - 21
No. of Sources of Supply - 23

Fig. 13



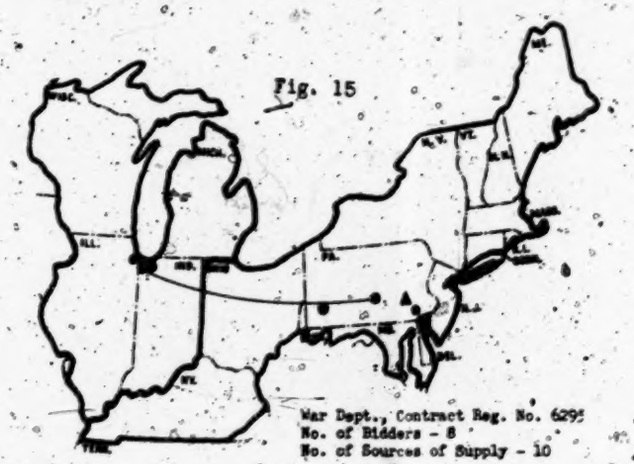
Navy Dept., Contract Reg. No. 9443
No. of Bidders - 7
No. of Sources of Supply - 5

Fig. 14



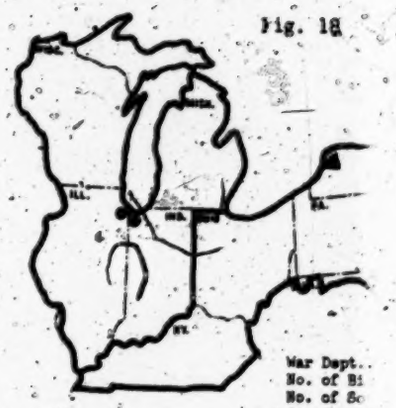
Navy Dept., Contract Reg. No. 9442
No. of Bidders - 8
No. of Sources of Supply - 7

Fig. 15



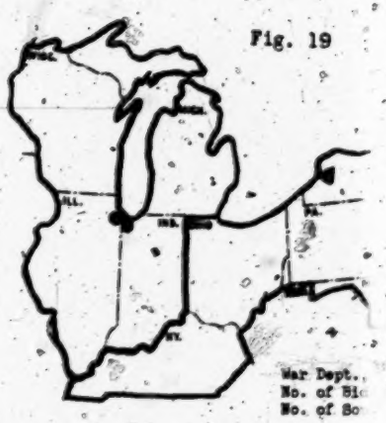
War Dept., Contract Reg. No. 6295
No. of Bidders - 8
No. of Sources of Supply - 10

Fig. 18



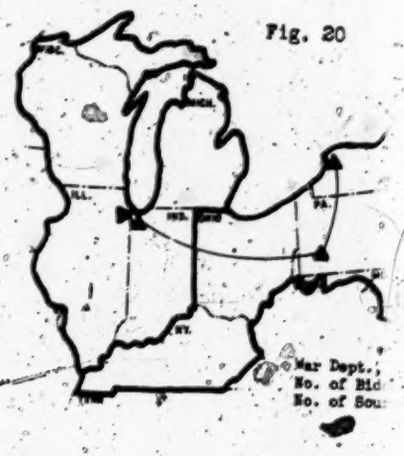
War Dept.,
No. of Bi
No. of So

Fig. 19



War Dept.,
No. of Bi
No. of So

Fig. 20



War Dept.,
No. of Bid
No. of Sou

GEOGRA

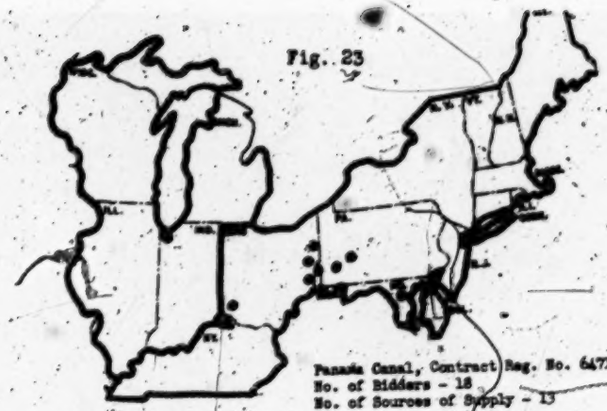
LEGEND
▲ - Sources of supply of successful bidders.
● - Sources of supply of other bidders.
Interconnecting lines indicate alternative sources of supply.

Contract Reg. No. 9443
...rs - 7
...es of Supply - 5

Fig. 18

War Dept., Contract Reg. No. 7379
No. of Bidders - 3
No. of Sources of Supply - 3

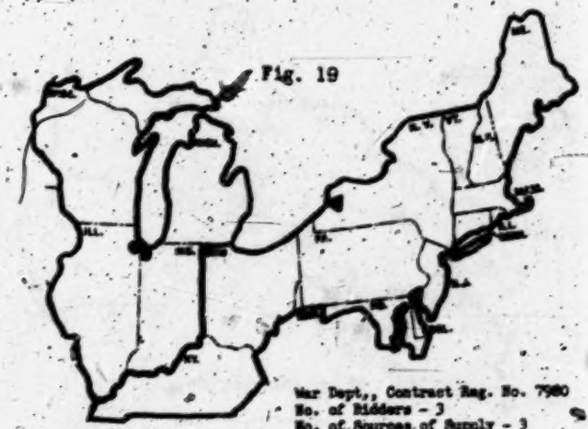
Fig. 23



Panama Canal, Contract Reg. No. 6471
No. of Bidders - 18
No. of Sources of Supply - 13

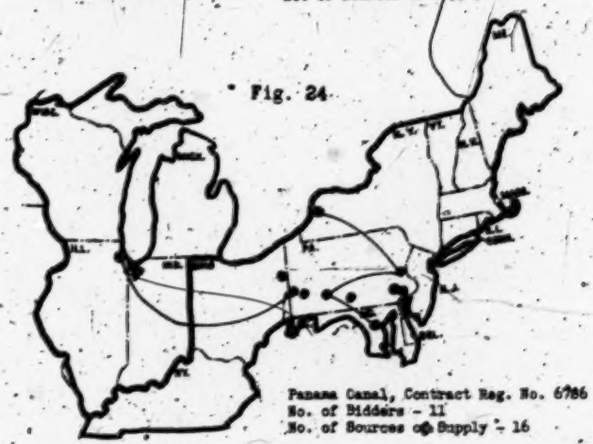
Contract Reg. No. 9442
...ders - 8
...es of Supply - 7

Fig. 19



War Dept., Contract Reg. No. 7980
No. of Bidders - 3
No. of Sources of Supply - 3

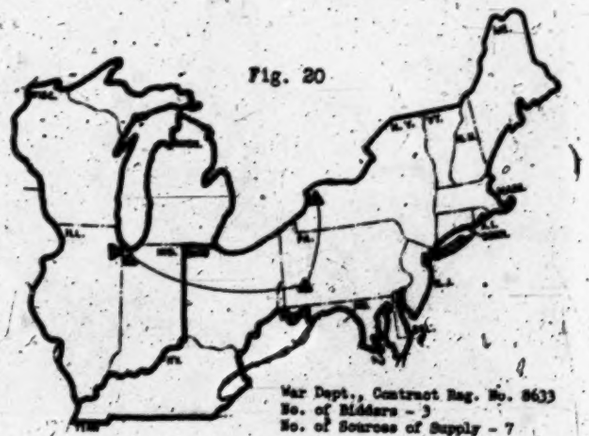
Fig. 24



Panama Canal, Contract Reg. No. 6786
No. of Bidders - 11
No. of Sources of Supply - 16

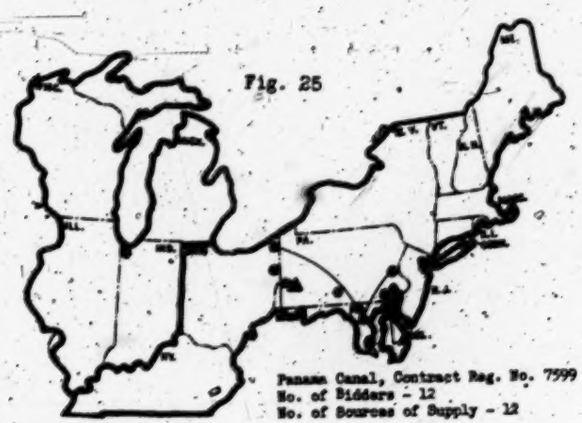
...ontract Reg. No. 6295
...rs - 8
...es of Supply - 10

Fig. 20



War Dept., Contract Reg. No. 8633
No. of Bidders - 3
No. of Sources of Supply - 7

Fig. 25



Panama Canal, Contract Reg. No. 7599
No. of Bidders - 12
No. of Sources of Supply - 12

GEOGRAPHICAL DISTRIBUTION OF SOURCES OF SUPPLY

Specified by Bidders on Each of 25 Contracts for Iron and Steel Products
Awarded by the Navy, War and Interior Departments and the Panama Canal
During the Period from January 1 to June 30, 1938

U.S. GOVERNMENT PRINTING OFFICE : 1940 — O - 213815

geneity of prevailing minimum wage rates within each of the six geographic areas (R. 239–254).

The respondents, quite obviously, do not object that the Acting Secretary broke the national market area into segments in response to the frequent localization of bids, and in response to geographical groupings corroborated by prevailing wage patterns. They object, rather, that the process of fractionalization was not carried further. But it seems perfectly evident that the determination of localities made by the Acting Secretary cannot be said to be unreasonably large once our construction of "locality" be accepted.

As we have shown by the analysis of the actual bidding on 72 contracts for steel products awarded during the six months prior to this determination, on only a few of those contracts did the actual bidding show that contracts would be performed in a locality or area substantially smaller than the Northeastern locality here challenged. On none of the contracts, as shown by the maps, was the bidding restricted to an area as small as that urged by respondents. To adopt the respondents' position would require that this apparently unvarying coalescence of the market area of the Northeastern locality be disregarded and the area split into small fractions in which different minimum wages would be paid according to the irrelevant consideration of the particular community in which the plant happened to be situated. We have shown that the Act, sensibly construed, cannot lead to such a result. By

the same token, the Acting Secretary cannot be said to have acted in disregard of the evidence because he declined to push the fragmentation argument urged by respondents to such an extreme as to frustrate the purposes of the Act and convert the determination into a useless affirmation of the *status quo*.

We do not urge that the considerations, weighed by the Acting Secretary—the market area, the geographical groupings of plants, and the prevailing wage patterns—can be applied with mathematical precision. It is his duty to reach a reasonable judgment based upon these considerations, and such others as he might have found to be relevant; to the extent that they point in different directions, he must of necessity strike a balance. This is the essence of the administrative function. Almost by definition, an honest judgment as to the best solution of such a problem cannot be said to be arbitrary. Certainly the painstaking report of the Public Contracts Board and the careful reexamination of the Acting Secretary compel the conclusion that, if their criteria be accepted, they have not arbitrarily been applied.

3. The respondents were accorded a fair hearing

We have shown there is neither statutory nor constitutional requirement that a wage determination be made only after a hearing. But even if we were so to assume, there can be no question but that the most exacting requirements have been met.

Hearings were held before the issuance of the steel wage determination, of which respondents had notice (R. 15, 45–46), and at which they were represented and submitted evidence (R. 16). The report and recommendations of the Public Contracts Board were sent to the respondents (R. 17, 47) with notice that they might take exceptions thereto (R. 17, 47). Respondents did file exceptions and a petition for the reopening of the hearings (R. 20–22, 218 et seq., 230 et seq.) and were afforded an opportunity to and did appear before the Acting Secretary for oral argument upon the exceptions (R. 22, 241). They were also afforded an opportunity to and did file a written brief in support of their exceptions (R. 22), which the Determination discloses were considered by the Acting Secretary (R. 241–247, 250–251).

Despite this punctilious observance of every requirement of statutory procedure, administrative fairness, and due process of law, the respondents in their bill of complaint (R. 31–32) aver that they were not accorded a fair hearing. We think none of the charges are such as to require answer; in any event, respondents as yet have not urged them in this Court.

V

THE COMPLAINT DOES NOT STATE A CAUSE OF ACTION FOR A DECLARATORY JUDGMENT

If the respondents have no standing to sue, or if this action is one against the United States, or if the Secretary's Determination is not reviewable,

it follows, of course, that a declaratory judgment must be denied. The only issue, therefore, is whether declaratory relief may be granted even if injunctive relief is not allowed, or in addition to injunctive relief.

There are intimations, upon which the respondents and the court below rely, that a showing of irreparable injury need not be made in order to secure a declaratory judgment of rights. See *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249, 264; *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 241. Whatever may be the rule in ordinary private actions,[32] it seems plain that in the circumstances of this case declaratory relief should not be afforded if an injunction would not issue. One reason is simply that, since it will not be supposed that Government officials (perhaps unlike private persons) will disregard a declaration unaccompanied by coercive relief,[33] to grant a declaratory judgment is equivalent in every way to granting an injunction. An adjudication that the wage determination in question is invalid will prevent the inclusion of wage stipulations in Government steel contracts just as surely as an injunctive command. On the hypothesis that no injunction should issue, any such command to the

[32] There are those who consider the statements of this Court equivocal and the point unsettled. Note (1938) 51 Harvard L. Rev. 1267, 1270, n. 24.

[33] See Borchard, *Declaratory Judgments*, pp. 342–343; Ellingwood, *Declaratory Judgments in Public Law* (1934), 29 Ill. L. Rev. 1, 2.

Government officers is necessarily undesirable in the circumstances here presented.

The second reason why the declaratory judgment should not issue is that a proper regard for the public interest in this controversy requires the conclusion that the contracting and purchasing functions of the Government be not subjected to interference at the suit of prospective bidders. Whether or not all of the limitations upon equitable jurisdiction are applicable to a suit for declaratory judgment,[25] it hardly would be argued that a court should issue a declaratory judgment in disregard of the considerations of public interest which would stay the hand of an equity court asked to issue an injunction. Certainly, the grant of the declaratory judgment is a matter of discretion with the Court. *Aetna Casualty & Surety Co.* v. *Quarles,* 92 F. (2d) 321 (C. C. A. 4th); *United States Fidelity & Guaranty Co.* v. *Koch,* 102 F. (2d) 289 (C. C. A. 3d); *American Automobile Ins. Co.* v. *Freundt,* 103 F. (2d) 613, 617 (C. C. A. 7th). Just as a court of equity will refuse to enjoin the collection of taxes (*Dows* v. *City of Chicago,* 11 Wall. 108, 109–10; *State Railroad Tax Cases,* 92 U. S. 575, 613 et seq.) and will refuse a decree contradictory of a

[25] *United States Fidelity & Guaranty Co.* v. *Koch,* 102 F. (2d) 288, 290 (C. C. A. 3d); *cf. Lumbermen's Mut. Casualty Co.* v. *McIver,* 27 F. Supp. 702, 706 (S. D. Calif); *Ohio Casualty Ins. Co.* v. *Plummer,* 13 F. Supp. 169, 173 (S. D. Tex.); *Town of Manchester* v. *Town of Townshend,* 109 Vt. 65, 69, 192 Atl. 22, 23 (1937).

statutory policy (*United States* v. *Morgan*, 307 U. S. 183), so a court should refuse a declaratory judgment which with equal clarity contravenes an important public policy. Note (1938) 51 Harvard L. Rev. 1267, 1274; Simpson, *Fifty Years of American Equity* (1936) 50 Harvard L. Rev. 171, 241. We have shown (*supra*, pp. 61–70) that to grant respondents relief against the petitioners constitutes a serious invasion of the hitherto unquestioned freedom of the contracting and purchasing functions of the Government from interference at the suit of prospective vendors. The same considerations which indicate that the respondents should not be granted standing to maintain this suit, (*supra*, pp. 18–70), or to ask for equitable relief (*supra*, pp. 87–89), point to a like conclusion under the power of the courts to issue declaratory judgments.

If the Court should grant relief by injunction, there would seem to be no occasion to add a declaratory judgment. This, however, is a matter of no importance to the petitioners.

CONCLUSION

The decision below should be reversed. First, because the respondents have no standing to maintain this suit. Second, because the action is brought against the United States. Third, because respondents have suffered no irreparable damage. Fourth, because the determination of the Acting Secretary was correct, both as a matter of

law and, if this be subject to review, in its application to the facts of this industry. Finally, respondents are not entitled to a declaratory judgment.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
TELFORD TAYLOR,
PAUL A. SWEENEY,
WARNER W. GARDNER,
Special Assistants to the Attorney General.
OSCAR H. DAVIS,
ROBERT KAPLAN,
Attorneys.

GERARD D. REILLY,
Solicitor,
CHARLES EDWARD RHETTS,
Associate Solicitor,
DAVID ZISKIND,
FREDERICK U. REEL,
Attorneys,
Department of Labor.

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CLERK

No. 593

In the Supreme Court of the United States

OCTOBER TERM, 1939

FRANCES PERKINS, INDIVIDUALLY AND AS SECRETARY OF LABOR OF THE UNITED STATES; CHARLES V. MCLAUGHLIN, INDIVIDUALLY AND AS ASSISTANT SECRETARY OF LABOR OF THE UNITED STATES; L. METCALFE WALLING, INDIVIDUALLY AND AS ADMINISTRATOR OF THE DIVISION OF PUBLIC CONTRACTS OF THE DEPARTMENT OF LABOR OF THE UNITED STATES; ET AL., PETITIONERS

v.

LUKENS STEEL COMPANY, A CORPORATION; ALAN WOOD STEEL COMPANY, A CORPORATION; SOUTH CHESTER TUBE COMPANY, A CORPORATION; ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

APPENDIX TO BRIEF FOR THE PETITIONERS

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213815—40—APP——1

APPENDIX A

Act of June 30, 1936, known as the Public Contracts Act, c. 881, 49 Stat. 2036 (41 U. S. C., Supp. IV, secs. 35–45):

AN ACT To provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations.

(a) That the contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract;

(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than

the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;

(c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week;

(d) That no male person under sixteen years of age and no female person under eighteen years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract; and

(e) That no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspections laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this subsection.

SEC. 2. That any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in

section 1 hereof shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, the sum of $10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; and, in addition, the agency of the United States entering into such contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in section 1 hereof may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: *Provided,* That no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the

contractor of the withholding or recovery of such sums by the United States of America.

SEC. 3. The Comptroller General is authorized and directed to distribute a list to all agencies of the United States containing the names of persons or firms found by the Secretary of Labor to have breached any of the agreements or representations required by this Act. Unless the Secretary of Labor otherwise recommends no contracts shall be awarded to such persons or firms or to any firm, corporation, partnership, or association in which such persons or firms have a controlling interest until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred.

SEC. 4. The Secretary of Labor is hereby authorized and directed to administer the provisions of this Act and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary to assist in the administration of this Act and to prescribe rules and regulations with respect thereto. The Secretary shall appoint, without regard to the provisions of the civil-service laws but subject to the Classification Act of 1923, an administrative officer, and such attorneys and experts, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as he may from time to time find necessary for the administration of this Act. The Secretary of Labor or his authorized representatives shall have power to make investigations and findings as herein provided, and prosecute any inquiry necessary to his functions in

any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act.

SEC. 5. Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of this Act, and on complaint of a breach or violation of any representation or stipulation as herein provided, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, failure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and shall

make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act.

SEC. 6. Upon a written finding by the head of the contracting agency or department that the inclusion in the proposal or contract of the representations or stipulations set forth in section 1 will seriously impair the conduct of Government business, the Secretary of Labor shall make exceptions in specific cases or otherwise when justice or public interest will be served thereby. Upon the joint recommendation of the contracting agency and the contractor, the Secretary of Labor may modify the terms of an existing contract respecting minimum rates of pay and maximum hours of labor as he may find necessary and proper in the public interest or to prevent injustice and undue hardship. The Secretary of Labor may provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act respecting minimum rates of pay and maximum hours of labor or the extent of the application of this Act to contractors, as hereinbefore described. Whenever the Secretary of Labor shall permit an increase in the maximum hours of labor stipulated in the contract, he shall set a rate of pay for any overtime, which rate shall be not less than one and one-half

times the basic hourly rate received by any employee affected.

SEC. 7. Whenever used in this Act, the word "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

SEC. 8. The provisions of this Act shall not be construed to modify or amend title III of the Act entitled "An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes," approved May 3, 1933 (commonly known as the Buy American Act), nor shall the provisions of this Act be construed to modify or amend the Act entitled "An Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes", approved March 3, 1931 (commonly known as the Bacon-Davis Act), as amended from time to time, nor the labor provisions of title II of the National Industrial Recovery Act, approved June 16, 1933, as extended, or of section 7 of the Emergency Relief Appropriation Act, approved April 8, 1935; nor shall the provisions of this Act be construed to modify or amend the Act entitled "An Act to provide for the diversification of employment of Federal prisoners, for their training, and schooling in trades and occupations, and for other purposes," approved May 27, 1930, as amended and supplemented by the Act approved June 23, 1934.

SEC. 9. This Act shall not apply to purchases of such materials, supplies, articles, or equipment as may usually be bought in

the open market; nor shall this Act apply to perishables, including dairy, livestock and nursery products, or to agricultural or farm products processed for first sale by the original producers; nor to any contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof. Nothing in this Act shall be construed to apply to carriage of freight or personnel by vessel, airplane, bus, truck, express, or railway line where published tariff rates are in effect or to common carriers subject to the Communications Act of 1934.

SEPARABILITY CLAUSE

SEC. 10. If any provision of this Act, or the application thereof to any persons or circumstances, is held invalid, the remainder of the Act, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

SEC. 11. This Act shall apply to all contracts entered into pursuant to invitations for bids issued on or after ninety days from the effective date of this Act: *Provided, however,* That the provisions requiring the inclusion of representations with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

Act of March 3, 1931, c. 411, 46 Stat. 1494 (40 U. S. C. Sec. 276 (a)) known as the Bacon-Davis Act:

* * * Every contract in excess of $5,000 in amount, to which the United States or the District of Columbia is a party, which requires or involves the employment of laborers or mechanics in the construction, altera-

tion, and/or repair of any public buildings of the United States or the District of Columbia within the geographical limits of the States of the Union or the District of Columbia, shall contain a provision to the effect that the rate of wage for all laborers and mechanics employed by the contractor or any subcontractor on the public buildings covered by the contract shall be not less than the prevailing rate of wages for work of a similar nature in the city, town, village, or other civil division of the State in which the public buildings are located, or in the District of Columbia if the public buildings are located there, and a further provision that in case any dispute arises as to what are the prevailing rates of wages for work of a similar nature applicable to the contract which cannot be adjusted by the contracting officer, the matter shall be referred to the Secretary of Labor for determination and his decision thereon shall be conclusive on all parties to the contract: Provided, That in case of national emergency the President is authorized to suspend the provisions of this Act.

Section 1 of the Bacon-Davis Act, as amended by the Act of August 30, 1935, c. 825, Sec. 1, 49 Stat. 1011, (40 U. S. C., Supp. IV, Sec. 276a).

* * * The advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers

shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics, and that the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work; and the further stipulation that there may be withheld from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

APPENDIX B

STATE DECISIONS ON THE STANDING OF BIDDERS TO MAINTAIN ACTIONS TO COMPEL STATE OR MUNICIPAL OFFICERS TO COMPLY WITH THE PROVISIONS OF STATE OR MUNICIPAL "LOW-BIDDER" LAWS

In almost every state there are constitutional or statutory provisions requiring that public contracts generally, or certain types of public contracts, be let by advertising and award to the "lowest bidder," "lowest responsible bidder," "lowest and best bidder," or on the most advantageous terms as defined in some comparable manner. In many states the general laws relating to municipalities, or the charters or ordinances of particular municipalities, contain such provisions. It is almost universally held that taxpayers, or property owners liable to assessment for particular improvements, may by mandamus, injunction, certiorari, or other appropriate writ, force public officials to comply with such provisions if a threatened waste of public funds can be shown. The decisions with respect to the rights of bidders and prospective bidders under these statutes are summarized hereinafter.

1. In the following twelve states, it is definitely established that state or municipal "low bidder" laws are enacted for the benefit of the public alone, and that a bidder, even though alleged or shown to be the lowest responsible bidder and entitled to the contract under the statute, cannot enjoin a rejection of his bid or an award to a competing bid-

der, or compel an award to himself, or obtain damages for loss of profits: Arkansas, Delaware, Georgia, Iowa, Kentucky, Maryland, Missouri, Montana, North Dakota, Pennsylvania, West Virginia, and Wisconsin. *Arkansas Democrat Co.* v. *Press Printing Co.*, 57 Ark. 322, 21 S. W. 586 (1893); *Keough* v. *Mayor and Council of Wilmington*, 4 Del. Ch. 491 (1872); *Peeples* v. *Byrd*, 98 Ga. 688, 25 S. E. 677 (1896); *Vincent* v. *Ellis*, 116 Ia. 609, 88 N. W. 836 (1901); *Mortland* v. *Poweshiek County*, 156 Ia. 720, 137 N. W. 1009 (1912); *Hamlin* v. *The Ind. Dist. of Charles City*, 66 Ia. 69, 23 N. W. 268 (1885); *Mills Publishing Co.* v. *Larrabee*, 78 Ia. 97, 42 N. W. 593 (1889); *Bancamerica-Blair Corp.* v. *State Highway Comm.*, 265 Ky. 100, 95 S. W. (2d) 1068 (1936); *Kelly, Piet & Co.* v. *M. & C. C. of Balto.*, 53 Md. 134 (1879); *Fisher & Corozza Co.* v. *Mackall*, 138 Md. 586, 114 Atl. 580 (1921); *State ex rel. Doniphan State Bank* v. *Harris*, 176 S. W. 9 (Mo. 1915); *State ex rel. Johnson* v. *Sevier*, 339 Mo. 483, 98 S. W. (2d) 677 (1936) (overruling prior cases); *State ex rel. Stuewe* v. *Hindson*, 44 Mont. 429, 120 Pac. 485 (1912); *State* v. *Mitchell*, 105 Mont. 326, 74 P. (2d) 417 (1937); *Washburn Lignite Coal Co.* v. *Murphy*, 54 N. D. 113, 208 N. W. 837 (1926); *Commonwealth* v. *Mitchell*, 87 Pa. St. 343 (1876); *Commonwealth* v. *Guardians of the Poor*, 16 Phila. 6 (1883); *Maguire* v. *Kirchner*, 14 Pa. D. & C. 540 (1930); *Butler* v. *Printing Commissioners*, 68 W. Va. 493, 70 S. E. 119 (1911); *State ex rel. Phelan* v. *Board of Education*, 24 Wis. 683 (1869); see *R. G. Wilmott Coal Co.* v. *State Purchasing Comm.*, 246 Ky. 115, 54 S. W. (2d) 634 (1932); *cf. Harian* v. *Em-*

ployers' Assn. of Maryland, 162 Md. 124, 159 Atl. 267 (1932).

2. In Hawaii, Louisiana, Nebraska, New Jersey, and Ohio, "low bidder" acts have been held to support action by bidders to enforce or prevent violations of their provisions by state or municipal officers. In Hawaii, Louisiana, Nebraska, and Ohio, a bidder entitled by law to an award may compel it by mandamus. *Marshall Co.* v. *Bigelow,* 29 Haw. 48 (1926); *Bienvenu* v. *Police Jury,* 126 La. 1103, 53 So. 362 (1910); *St. Landry Lumber Co.* v. *Town of Bunkie,* 155 La. 892, 99 So. 687 (1924); *State* v. *Louisiana State Bd. of Agric. & Imm.,* 122 La. 677, 48 So. 148 (1909) (holding that the action derives not from statute but "from the agreement resulting from the bidder's acceptance of the offer contained in the advertisement"); *State* v. *Cornell,* 52 Neb. 25, 71 N. W. 961 (1897); *State* v. *Board of Control,* 122 Neb. 897, 240 N. W. 557 (1932); *Boren & Guckes* v. *Commrs. of Darke County,* 21 Ohio St. 311 (1871); *State* v. *Building Comm.,* 124 Ohio St. 413, 179 N. E. 138 (1931); 125 Ohio St. 301, 181 N. E. 129 (1932); but cf. *Carmichael* v. *McCourt,* 6 Ohio C. C. (N. S.) 561 (1905); *State* v. *Commrs. of Shelby County,* 36 Ohio St. 326 (1881) (mandamus will not lie under statute requiring award to "lowest and best bidder"). And in New Jersey a bidder who can show clearly that he is the lowest bidder and is entitled to the award may obtain judicial review of the award by *certiorari. Maginnis* v. *City of Wildwood,* 94 N. J. L. 90, 108 Atl. 780 (1920); *Tufano* v. *Borough of Clifford Park,* 110 N. J. L. 370, 165 Atl. 628 (1933); see *McGovern* v. *Trenton,* 60 N. J. L. 402, 38 Atl. 636 (1897).

3. In the following twenty-two states, there are no decisions concerning the rights of bidders to enforce compliance with "low-bidder" acts, although in these states, as in others, taxpayers may maintain such actions: Alabama, Arizona, California, Florida, Idaho, Kansas, Maine, Massachusetts, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming. In Oregon, suits by unsuccessful bidders fail because they are held to be suits against the state without its consent. *Herald Publishing Co.* v. *Klamath Falls Pub. Co.*, 116 Ore. 62, 240 Pac. 244 (1925).

4. In Colorado, the courts have not passed upon the rights of bidders under the Colorado Constitution, which requires competitive bidding, but in one case a suit was entertained, without discussion of standing to sue, in which a bidder unsuccessfully sought a declaratory judgment that a state law regulating wages on public contracts violated the Constitution. *Smith-Brooks Printing Co.* v. *Young*, 103 Col. 199, 75 P. (2d) 39 (1938). Cf. *Denver Bldg. & Const. Trades* v. *Vail*, 103 Col. 364, 86 P. (2d) 267 (1938).

5. In Connecticut there are no cases discussing the standing of a low bidder as such to maintain an action. However, the case of *Dibble* v. *New Haven*, 56 Conn. 199, 14 Atl. 210 (1888) quite clearly indicates that a bidder would have no such standing. In that case a taxpayer sued for an injunction to restrain the award of a contract to anyone but the lowest responsible bidder. It was held that an individual taxpayer could not sue, and the court's

reasoning would apply equally to a bidder. The court said:

> In making expenditures for such purposes, the will of the municipality is a law unto itself, as is that of an individual to himself, and as little subject to judicial control; and if it appoints an agent to make contracts in its name for such purposes, a court has no greater power to restrain that agent than it has to restrain the agent of an individual.

6. In Illinois, it was at first held that a bidder had no standing to attack an illegal award of a public contract. *Kelly* v. *City of Chicago,* 62 Ill. 279 (1871). However, the later decision in *Callaghan & Co.* v. *Smith,* 304 Ill. 532, 136 N. E. 748 (1928), appears to be inconsistent with the earlier case. It was recently held in *Broansfield Co.* v. *Kingery,* 283 Ill. App. 405 (1936) that the lowest responsible bidder could compel, by mandamus, an award to himself.

7. In Indiana, a bidder cannot maintain an action for damages because of an illegal award to a competitor. *Boseker* v. *Board of Commissioners,* 88 Ind. 267 (1882); *Lane* v. *Boone County,* 7 Ind. App. 625, 35 N. E. 28 (1893). Apparently, a bidder cannot obtain injunctive relief. See *Ness* v. *Board of Commissioners,* 178 Ind. 221, 236–37, 98 N. E. 33 (1912). In *Lane* v. *Boone County, supra,* the court stated:

> The statute cited was not enacted for the benefit of bidders but for the protection of property owners affected by the improvement, and, possibly, also, for the benefit of the general public.

8. In Michigan, it appears, the usual rule is followed that bidders have no standing to maintain actions under "low bidder" statutes. *Detroit Free Press Co.* v. *Board of Auditors,* 47 Mich. 135, 10 N. W. 171 (1881); *Riker* v. *Oakland Circuit Judge,* 138 Mich. 181, 101 N. W. 229 (1904). The above cases appear to have overruled *Ayres* v. *State Auditors,* 42 Mich. 422, 4 N. W. 274 (1880). But cf. *Attorney General* v. *City of Detroit,* 225 Mich. 631, 196 N. W. 391 (1923).

9. The Minnesota courts have never passed upon the question, but in *State* v. *Snively,* 175 Minn. 379, 221, N. W. 535 (1928), where mandamus was unsuccessfully sought (no abuse of discretion appearing) by an alleged lowest responsible bidder, the court said:

> There is good authority that such provisions of statutes and charters are ordinarily for the benefit of taxpayers rather than bidders, and confer no actionable rights upon the latter.

10. There are no square decisions in Mississippi on the question under discussion, but in two cases the Supreme Court of Mississippi has suggested that a bidder has no right to maintain an action. See *Dixon-Paul Printing Co.* v. *Board of Public Contracts,* 117 Miss. 83, 88, 77 So. 908 (1918); *Hirsh* v. *Mayor and Aldermen of City of Vicksburg,* 141 Miss. 827, 835–36, 843, 105 So. 492 (1925).

11. In New York, the early cases held that "low bidder" laws are for the benefit of the public, not of bidders, and gave bidders no standing to attack the award of public contracts. *People ex rel. Belden*

v. *The Contracting Board,* 27 N. Y. 378 (1863); *People ex rel. Bullard* v. *The Contracting Board,* 33 N. Y. 382 (1865); *People ex rel. Yates* v. *Canal Board,* 13 Barb. 432 (1852); *People* v. *The Croton Aqueduct Bd.,* 26 Barb. 240 (1857); *People ex rel. Lynch* v. *Alderman of New York,* 11 Abb. Prac. 289 (1860); *M'Cafferty* v. *Glazier,* 10 How. Prac. 475 (1854); cf. *Adams* v. *Ives,* 63 N. Y. 650 (1875); *People* v. *Common Council,* 78 N. Y. 33 (1879); *Strong* v. *Campbell,* 11 Barb. 135 (1851); *People ex rel. West* v. *Smith,* 12 Abb. Prac. 133 (1861).

However, in two cases decided in the lower New York courts, mandamus was granted at the suit of a bidder where the contract had not yet been let to another bidder. *People ex rel. Vickerman* v. *The Contracting Board,* 46 Barb. 254 (1865); *People ex rel. Matthews* v. *City of Buffalo,* 5 Misc. 36, 50 N. Y. Supp. 50 (1893); cf. *Weed, Parsons & Co.* v. *Beach,* 56 How. Prac. 470 (1879).

Subsequent to the early Court of Appeals cases which held that a bidder had no standing to obtain a writ of mandamus, a series of decisions established that such a bidder could not recover damages against public officers or the city or state itself on account of an illegal award of a public contract to another. *East River Gas-Light Co.* v. *Donnelly,* 93 N. Y. 557 (1883); *Walsh* v. *Mayor, etc., of New York,* 113 N. Y. 142, 20 N. E. 825 (1889); *Molloy* v. *City of New Rochelle,* 198 N. Y. 402, 92 N. E. 94 (1910). But in the *Molloy* case the court departed from the actual question there presented to state (p. 411) that it would not decide whether mandamus would lie at the suit of a bidder to compel an award.

Recently, and without further discussion, the Court of Appeals has reaffirmed the rule of the early *Belden* and *Bullard* cases, *supra*, that bidders have no standing to compel by mandamus the award of contracts. *Matter of Gavaert Co.* v. *Greeff*, 262 N. Y. 651 (1933), aff'ing 239 App. Div. 895, 264 N. Y. Supp. 943 (1933). Several decisions in the lower New York courts are to the same effect. *People ex rel. Shay* v. *McCormack*, 167 App. Div. 854, 153 N. Y. Supp. 808 (1915); *Nathan* v. *O'Brien*, 117 App. Div. 664, 102 N. Y. Supp. 947 (1907); *Matter of Bartinger Elec. Co.* v. *Forbes*, 170 Misc. 589, 10 N. Y. Supp. (2d) 924 (1939); cf. *Matter of Martin Rooney*, 26 Misc. 73, 56 N. Y. Supp. 483 (1899). But there are decisions in the lower courts to the contrary. *People ex rel Argus Co.* v. *Palmer*, 12 Misc. 392, 33 N. Y. Supp. 1088 (1895); *Arensmeyer, Warnock, Zarndt, Inc.* v. *Wray*, 118 Misc. 619, 194 N. Y. Supp. 398 (1922); *Burland Printing Co.* v. *LaGuardia*, 9 N. Y. Supp. (2d) 616 (1938); cf. *Matter of Weinstein Building Corp.* v. *Scoville*, 141 Misc. 902, 254 N. Y. Supp. 384 (1931).

In two cases in the Court of Appeals, where a bidder had sought to review awards of the State Printing Board by *certiorari*, the awards were affirmed without discussion of the bidder's standing to sue, the question not being raised. *People ex rel. Lyon Co.* v. *McDonough*, 173 N. Y. 181, 65 N. E. 963 (1903); *People ex rel. Williams* v. *McDonough*, 176 N. Y. 606, 68 N. E. 1123 (1903). Where the question has been raised, it has been consistently held that the award of public contracts is not a judicial proceeding, and cannot be reviewed

by *certiorari*. *People ex rel. North* v. *Featherstonhaugh*, 172 N. Y. 113, 64 N. E. 807 (1902); *Matter of Standard Bitulithic Co.*, 212 N. Y. 179, 105 N. E. 967 (1914); *Matter of Kandel* v. *Greene*, 236 App. Div. 607, 260 N. Y. Supp. 502 (1932); *People ex rel. Argus* v. *Hugo*, 101 Misc. 481, 168 N. Y. Supp. 25 (1917), aff'd 182 App. Div. 904, 168 N. Y. Supp. 1123 (1918).

12. In Vermont there has been but a single decision involving the rights of bidders under "low-bidder" statutes. *Free Press Assoc.* v. *Nichols*, 45 Vt. 7 (1872). Mandamus was denied on other grounds, but the court intimated that the bidder had no standing to sue, stating (p. 18) that the principal object of the law was to benefit the state.

13. The early cases in Washington are in conflict with respect to the rights of bidders to maintain actions. Compare *Times Publishing Co.* v. *Everett*, 9 Wash. 518, 37 Pac. 695 (1894) with *Berry* v. *Tacoma*, 12 Wash. 3, 40 Pac. 414 (1895). More recently it has been held that a bidder may enjoin an illegal award to a competitor, but cannot compel an award to himself. *American Pub. Co.* v. *Bellingham Pub. Co.*, 145 Wash. 25, 258 Pac. 836 (1927).

APPENDIX C

The following extracts from the debate and hearings on the Public Contracts Act indicate the general purposes of the Public Contracts Act and the particular practices which Congress wished to suppress, namely, the migration of industries to areas of low labor costs and the extension of sweatshop practices.

Extracts from Cong. Rec., 47th Cong., 2nd Sess., Vol. 80, Part 9:

Mr. HEALEY. * * * Mr. Chairman, the object of this legislation is to require persons having contracts with the Government for the performance of public work and for the supplying of material and equipment to conform to decent, fair labor standards in the performance of those contracts (p. 10001).

Mr. GREENWOOD. Mr. Speaker, a good many questions have been asked which probably should have been directed to members of the legislative committee that held hearings.

I think, however, this bill is a step in the right direction and will help solve the unemployment question and uphold the standard of living. It will set an example of what the Government considers a fair day and a fair week as to hours of labor and provides for the prevailing wage as a minimum. The Government undertakes to lead the way for better economic conditions and a better spread for employment (p. 9993).

Mr. MEAD. * * * I know but little about the mechanics of this legislation. I did not serve upon the subcommittee that considered the measure nor the full committee that reported the bill to this House, but I am going to say to every Democrat and Republican in the Chamber this is another attack at the greatest problem we have to face in this industrial, machine age in which we live. It limits the day to one of 8 hours, the week to one of 40 hours. It prevents child labor and destroys the sweatshop. It will never be solved unless the Government adopts drastic means in the sphere in which we have complete control. Here the courts cannot invalidate the affirmative action of the Congress. Certainly we have control over the purchases and contracts made by the Federal Government. This measure is also a protection for legitimate industry. It is an attack upon homework and sweatshops, enemies of legitimate industry. Let us pass this bill and put an end to this cruel practice of exploiting our women and children. I believe it is a proper approach—in fact, the only approach—to the question that we must solve, namely, the unemployment question, that vexes this and every other industrial nation on earth (p. 10005).

Mr. SIROVICH. * * * The Walsh-Healey bill which we are now debating on the floor of this House, in my humble opinion, is a powerful weapon that will help to restore the consuming and purchasing power of the working people of our Nation. This great humanitarian bill is the Magna Carta—the emancipation proclamation of the toiling laboring classes since the Supreme Court declared the N. R. A. unconstitutional. It will serve as a model for all

industry, the great commercial and business organizations to emulate.

* * * * *

We have today almost 10,000,000 people unemployed. The perfection, development, and elaboration of technological machinery has dislocated the economic working conditions throughout the Nation. It is necessary to diminish the hours of labor in order to divide the work between the millions of unemployed without subtracting from the wages of the working people, in order to protect their consuming and purchasing power, upon which the prosperity of our Nation is dependent. This measure in the Walsh-Healey bill safeguards this great ideal (p. 10012).

MR. CITRON. * * * I frankly confess that I am worried about the textile industry of my State. I am worried because firms are moving to foreign fields, like Canada, or to other sections where they can take advantage of low-standard wages. Can the high-wage-paying manufacturer compete fairly with the low-wage-scale competitor without reducing his wages? I am worried about maintaining the high labor standards it has taken years to build up. It is not fair to have the Government foster a system which turns its business over to those who would break down our high American standards.

* * * * *

Certainly the power of the Government to make a contract is the same as that of a private individual. An individual has the right to demand certain requirements for obtaining the award of his contract but the Government has not such a right because it

is limited in its business dealings to the lowest bidder.

At present the decent manufacturer is discriminated against. This measure will end that discrimination. It will prevent the charge that can be asserted now that decent manufacturers are under a handicap. Shall they continue to be under a handicap? (p. 10009.)

Mr. CELLER. * * * The Government must now take definite forward steps. It does not coerce. It does not compel anyone in this bill to do anything. It says that if you want the advantage of a Government contract then you must comply with minimum labor standards—decent, forward-looking standards—not standards of a reactionary sweatshop period. There can be no home work, no child labor involved in these Government contracts.

Ofttimes, under present law curbstone brokers fly-by-night contractors, get the contracts under the lowest-bidder conditions. All that is needed is a bond. A bond is easily procurable. As a result the successful bidder makes up the difference due to the low bid on labor. Labor pays the piper. Decent standards are broken down.

By this bill we disassociate the Government from vile antisocial conditions (p. 10010).

Mr. SIROVICH. * * * The Walsh-Healey bill will prevent exploitation of the American workingman by many industrialists of our country who can only live and thrive through the exploitation of labor. This great humanitarian measure will prevent the Government of the United States from being particeps criminis and a contributing factor in the exploitation of its

citizens whose interest we here, as Members of the House of Representatives, have sworn to protect (p. 10012).

Mr. O'MALLEY. * * * I say this Government ought to set the example of refusing to buy a single thing from any manufacturer who pays his employees starvation wages, from any manufacturer who operates a sweatshop. The Government ought to set the same example in respect to material purchases that it sets for industry by the Postal Service and other governmental agencies, where hours and wages are on a living basis. I think the American taxpayers do not want to build buildings at the expense of workers receiving starvation wages or to buy materials manufactured at prices which affect the very lifeblood of little children. I do not see how anybody with any decency would want us to refuse to pass a law that would prevent this Government from buying from sweatshop concerns for all time. I hope this bill will pass. I hope, as my colleague said, that it affects 99 percent of the business of the country, and that no business that operates under sweatshop and exploitation methods can continue to sell a single dollar's worth of goods to the Government of the United States (p. 10018).

Mr. HEALEY. * * * We feel that if these conditions are included in future Government contracts that we will have cured many evil practices which have cropped up in the most vicious forms under Government contracts, since the existing law requires that all contracts for supplies, materials, and equipment must be awarded to the lowest responsible bidder, the only qualifications being financial responsibility only (p. 10002).

Extracts from Hearings before the Committee on the Judiciary of the House of Representatives, 74th Cong., 1st Sess. on S. 3055 (referred to as "Hearings, Part 1") and from Hearings before a Subcommittee of the Committee on the Judiciary, House of Representatives, 74th Cong., 2nd Sess. on H. R. 11554 (referred to as "Hearings, Part 2"):

STATEMENT OF JOHN P. FREY, PRESIDENT OF THE METAL TRADES DEPARTMENT OF THE AMERICAN FEDERATION OF LABOR

Mr. FREY. * * * We have a serious problem on this question of the Government's being compelled to enter into a contract with the lowest bidder or the lowest satisfactory bidder, and that means that he gives a satisfactory bond. And now we have this apparently inconsistent position: The Government of the United States, this administration, doing everything it humanly can to increase the consuming capacity of the American people, a consuming capacity that is the very life on which business itself depends.

So, on the one hand we have had the President of the United States, the members of his Cabinet, we have had the Congress of the United States and other agencies, endeavoring to build up the consuming capacity of the Nation; and yet, on the other hand, for lack of such a bill as is under consideration, we find the Government favoring the employer who imposes the lowest standard of labor humanly possible and getting away with it without calling out the militia.

That is the question as we see it stripped of all of the details. Stripped of all the details, with all of the conflicting interests that may be involved, it gets down to this:

Is it the policy of this Congress to build up the consuming capacity of the mass of the people, or is the Government to be used as the means for beating down the higher labor standards that so many employers have established? Are we to injure, are we to inflict an injury upon every businessman hoping for Government work, by saying to him, "We admire you for establishing a high standard for labor for your establishment, but for that reason we bar you from an opportunity of getting any contracts for Government work"? To me it seems that the question involved is a very simple and a very direct and a very practical one.

[Hearings, Part 1, page 79.]

STATEMENT OF FRANK E. WALSH, REPRESENTING UNITED GARMENT WORKERS OF AMERICA

Mr. WALSH. * * * If Congress does not pass this bill, how in the world are we ever going to get out of this depression? We have waited a long time for business to take the initiative and to pay a decent wage and to lower the hours of employment, in order to speed work over a wide area of our country.

[Hearings, Part 1, page 108.]

STATEMENT OF MISS FREDA MILLER, REPRESENTING THE NEW YORK STATE DEPARTMENT OF LABOR

Miss MILLER. Mr. Chairman and members of the committee, the interest of the New York State Department of Labor in such legislation as is here proposed is based on the long and consistent policy of New York State in maintaining, through legislation, what we feel are advanced standards for

labor in the State. We maintain by law limited hours, days of rest, and payment of wages in cash, and we have attempted recently to maintain a minimum wage scale by law. We have consistently maintained that policy through bad times and good, because we feel that our experience fully demonstrates that such a labor policy means, not only better conditions for the workers themselves, but a more stable installation in the State of State credit, with a steady influx of work and a lesser degree of unemployment than in some other part of the country.

[Hearings, Part 2, p. 176.]

STATEMENT OF WILLIAM GREEN, PRESIDENT, AMERICAN FEDERATION OF LABOR

Mr. GREEN. * * * There is always a minority that, by their actions, tend to tear down an economic structure that has been built. The great majority of employers desire to maintain decent standards and earnestly endeavor to do so, because they know that only through the development of high purchasing power can they create a market for the sale of their goods. But there is always a minority that wants to be the rule and a law unto themselves, and that minority cuts and slashes and imposes longer hours and undesired conditions of employment; and as a result their costs are lower and they go into the market and undersell the employers who desire to maintain decent conditions.

Well, when that happens to any ordinary degree, what must the decent employer do? He is forced reluctantly to meet that kind of competition, and that is the basis of much of our trouble. We are trying as best we can to stem that tide and prevent that by

putting this bottom under our economic structure, and thus, compel, by such procedure, this lawless minority, if I may classify them as such, from tearing down the wage structure.

* * * * *

The enactment of this legislation will be a boon, not only to labor but to all fair-minded and humanitarian employers. I wish to impress upon this committee and upon all Members of Congress the terrible unemployment situation now existing. I think I can appropriately refer to that, because this measure will, in its administration, tend to help very greatly in relieving the unemployment situation. I am sure of that, because if it does establish decent hours and wages, that will mean that opportunities for work will be increased, and to that extent, we will apply a partial remedy for unemployment.

[Hearings, Part 2, pages 364, 378.]

STATEMENT OF ARNOLD BERMAN, CROWN OVERALL MANUFACTURING CO., CINCINNATI, OHIO

Mr. BERMAN. * * * I am the vice president of the Crown Overall Manufacturing Co. and represent a group of manufacturers who are in favor of this bill. I think we have a new thing to bring to this hearing. * * *

I also appear as the representative of the Union Made Garment Manufacturers Association of America, an association of work-clothing manufacturers with plants located all over the country and who produce approximately 95 percent of the work and service garments made in those plants.

We are in favor of this legislation because we believe in the fundamental principles of fair wage and decent working conditions. We are opposed to wage cutting and hold that competition should be based on quality and service and not on wage cuts and sweatshop standards.

Some time ago the Congress passed legislation which requires the Government to purchase, and all contractors to furnish only materials and products which are made in the United States. This was done to protect American industry and American workmen and farmers. The Walsh bill has a similar and parallel interest—to insure a fair wage to those working on Government contracts and to protect manufacturers who maintain decent working conditions. These manufacturers seek no special consideration, they only ask that they be protected from unscrupulous factors who derive their main advantage from their ability to reduce wages.

This committee will be interested to learn what effect the present method of Government purchasing has had on the garment industry, particularly that branch which I represent, working clothing.

Government purchases in our field constituted a small percentage of the production until the advent of the C. C. C. and relief programs. These agencies for some time have been supplying their beneficiaries with work and service garments which normally found their way to these persons through retail stores. Now that millions of garments are being given free to the unemployed, our markets have been narrowed considerably and the only way we can hope to regain a portion of this market is to supply the Government purchasing agencies.

I will give you a specific example: To produce a dozen pair of overalls of the kind that the Government is buying in standard shops the price of the labor will be anywhere from $2.50 to $2.25 a dozen for the labor alone. In some shops in which the Government is now buying, wages will be possibly 80 or 90 cents a dozen.

Now, fair manufacturers who are trying to maintain conditions in the industry cannot compete under those circumstances, and the whole question is as to whether this money that the Government has is to be spent to beat down working conditions and to destroy purchasing power of the people, or whether it is to be spent to maintain the chiselers who have been getting control of the country during the depression.

Mr. McLAUGHLIN. Mr. Berman, may I ask you a question there?

Mr. BERMAN. Yes.

Mr. McLAUGHLIN. Are you getting any contracts now on the C. C. C.?

Mr. BERMAN. No, sir; we are not. Our industry is barred from that because we are not in a position to compete, because we are trying to maintain a reasonable or a fair standard, and that is why we are barred.

Mr. McLAUGHLIN. You are bidding on them, but you cannot get them?

Mr. BERMAN. Yes, sir; we are bidding on them and we cannot get them.

Now, why should manufacturers be blacklisted in effect because they are trying to put through the policy of the Government in increasing purchasing power and maintaining decent standards?

Mr. Chairman, I could say a great deal more, but I do not care to infringe on your time.

Mr GREGORY. The Members are very anxious to attend a roll call. You may submit the rest of your statement for the record if you desire.

Mr. BERMAN. I would like to do that because it is in better shape.

A specific example will perhaps better serve to illustrate how the present method of Government purchasing has affected those garment manufacturers who have always maintained decent wage standards and working conditions, and has shut them out of securing their fair and proportionate share of this business.

When the Government decides that it needs to purchase a quantity of garments such as overalls (denim jumpers and trousers), the properly designated agency issues invitations to bid on the requirements. All of the materials such as cloth (denim), thread, buttons, buckles, labels, et cetera, are designated with ironclad specifications. The prices at which each bidder or garment manufacturer can secure these items is identically the same. They are staple materials, and market prices are solidly established by their producers. It therefore can be seen that no bidder has any advantage over the others because of a possibility of making favorable purchases of raw materials. Construction details are likewise carefully specified and this permits no advantage to anyone for there is no possibility of deviation. The only place for a variation is in the labor cost and the bidder, who can chisel his labor to the point where he gets his garments made at the lowest labor cost, gets the order.

This regrettable and unfair situation has forced wages on Government garments to a low level, and the boldest wage cutters get

these Government orders. Under the present system the Government is unknowingly forcing down wages in the garment industry. Wage cuts on Government orders reflect on wage scales for commercial garments. When a manufacturer achieves a low-wage level for Government garments, he applies the same measure of compensation to labor on other garments he produces. The effect of these wage cuts is then felt in competition on garments sold on the open market. The result of all this is that the standard of wages is continually lowered.

This rather briefly explains what has happened to the work-garment industry as a result of the Government policy of favoring the lowest bidder without regard for a wage policy.

The Walsh bill will correct this evil. It will give the garment manufacturer who pays decent wages an opportunity to secure some of the Government contracts and will help maintain a fair standard of wages in the work-garment industry.

[Hearings, Part 1, pages 79–82.]

STATEMENT OF A. F. HINRICHS, CHIEF ECONOMIST OF THE BUREAU OF LABOR STATISTICS

Mr. HINRICHS. Mr. Chairman and gentlemen of the committee, the bill which is now before your committee seeks to maintain reasonable standards of wages and hours of labor in establishments securing Government contracts. Since the Schechter decision there are many States in which no legal protection is afforded to standards as high as those prevailing under the codes of fair competition. A study of changes in wages, hours, and labor conditions since the N. R. A. indicates that the standards

achieved under the codes have in many instances been lowered. To prevent the continued lowering of wages and the revival of child labor and long hours, I strongly urge the favorable consideration of this bill.

At present, the Government is compelled by law to purchase its supplies and deal with the lowest responsible bidder. Following the *Schechter case* and the abandonment of the N. R. A., the Comptroller General ruled that the Government in awarding its contracts must do so without giving any consideration to the conditions of labor prevailing among the bidders. Thus the law of Government contracts works to the advantage of the antisocial employer who is enabled to make low estimates and obtain Government contracts through the slashing of wages or by working his employees for excessive hours. He is even permitted to resort to the employment of child labor. By resorting to these practices such an employer undercuts those of his competitors who seek to deal justly with their employees. The Government than as at present, while urging the maintenance of labor standards, actually deals with those employers who have come to disregard the practice established by industry under the codes. The effect of such practices extends even beyond the contract in question and tends to establish low labor standards for the industry in general. An investigation of firms engaged on Government work supports the truth of these conclusions, that report having just been submitted to you.

* * * * *

The complaints which are received, "For heaven's sake, do something about the situa-

tion we are up against," which came in from manufacturers, were not all routed to a single agency. Of the complaints that are received, the Bureau of Labor Statistics handles only a small part of the total, and it does not seem worth while to tabulate those particular complaints. I can say that the type of complaint wherein they specified the question of Government contracts was one of the most frequent complaints. That was one of the most frequent complaints that came to my office, and they came from manufacturers saying that they were maintaining standards. They say, "We are maintaining standards; but here is the Government engaged in letting contracts to the lowest bidder, irrespective of the conditions under which the bid is made." They would ask, "Is there anything in the world that the Government can do?" Private industry is in the position at this time of knowing that any man who threatens to cut wages and lower the standards of private industry, as on occasions has been done, is already a constant antisocial force in certain industries.

In some industries they are trying to see that the standards shall be maintained, but in the case of the Government contractor, as I see it, that situation is being thrown exactly into reverse. We put the whole moral force of the Government behind people who are engaged in trying to maintain standards. We give them a "God bless you," on any form of voluntary agreement that does not involve a violation of the antitrust legislation; but yet, in the thing that really counts, where money is to be paid, or when we come to make a large contract, that thing is not done at all. So it seems to me that in that one field of the Government engaging posi-

tively in making contributions to standards, a provision can be made which does not necessitate going out and doing indirectly what we are not allowed to do directly.

[Hearings, Part 2, pages 153–6.]

STATEMENT OF CHARLES W. ERWIN, REPRESENTING THE AMALGAMATED CLOTHING WORKERS OF AMERICA

Mr. ERWIN. Mr. Chairman and gentlemen of the committee, my name is Charles W. Erwin, and I represent the research department, Amalgamated Clothing Workers of America. * * * We have about 145,000 workers involved in this bill. I approach it solely from the point of view of the sweatshop. * * *

According to a report in the Daily News Record of February 23, 1936, nearly half of the 3,500 firms holding Government contracts scrapped N. R. A. minimum-wage and maximum-hour records as soon as the Supreme Court voided the N. R. A. The information was obtained through an inquiry by the contracts division of the Government.

In connection with these facts it must be noted that on June 5, 1935, the News Record reported that the Philadelphia Army Depot announced that, following orders from Washington, it would no longer require adherence to N. R. A. standards by firms in bidding.

The Philadelphia Army Depot is one of the chief purchasing agents of the Government and is constantly letting orders for a wide variety of textile products—cotton, cotton textiles, sheeting, buttons, thread, pins, braid, binding, needles, cotton drill, denim, flannel, serge, lining, eyelets, silesia, blankets, caps, hats, gloves, socks, uniforms,

underwears, shirts, and breeches for the Army and for the C. C. C.

The magnitude of their orders may be judged by the fact that between March 23 and March 26, 1936, they propose to let contracts for the following articles: 1,061,500 pairs of shorts, 975,000 undershirts, 92,000 one-piece working suits, 220,000 pairs of trousers, 165,000 jumpers, 18,500 hats, and 49,874 caps.

Union firms have always been at a disadvantage in bidding for these orders. Among the most successful bidders have always been the Phillips-Jones Corporation, which is now making plans to move south to obtain cheaper labor than it now can obtain; and the Sigmund Eisner Co., which is notorious for the low standards it has always maintained. * * *

Our Pennsylvania officers report that the Lackawanna Pants Co. and the Anthracite Overall Co., of Scranton, made 50,000 pairs of trousers for the C. C. C. last summer. These firms never lived up to N. R. A. standards and now they work their employees an official 44-hour week and pay wages ranging from $8 to $12.

The leatherworkers union reports that no union firm has received any Government contract for a year, yet the Werber Leather Coat Co., of Beacon, N. Y., works solely on Government contracts. Their hours are not less than 44 and probably longer and wages are from $8 to $12 a week. You will remember the strike we had to obtain union recognition from this firm last year. The firm deliberately violated section 7A of the N. R. A. and there was considerable evidence at the time of the strike to show that the firm was not living up to the wage and hour standards of the N. R. A., either. * * *

Since there are more than half a million persons in the C. C. C. and clothing is bought for several hundred thousand members of the Army and Navy, for inmates of veterans' hospitals, and so forth, it is obvious that these Government orders constitute a substantial factor in the market for these items of men's clothing. Firms seeking Government orders reduce labor standards in order to secure such orders and this in turn affects labor conditions in all firms including those which do not ordinarily bid on Government orders.

On public construction jobs, such as buildings, and so forth, contracts already require that the prevailing scale of wages shall be paid and this prevailing scale is interpreted to be the union scale in cities where the building trades are organized. The fact that such requirements are included in the contracts for public construction jobs does not in any way interfere with free and competitive bidding for this work and prevents standards on public construction jobs from reducing standards on private work. * * *

I am able to speak from a different point of view of any witness, because for 30 years I have had to investigate sweatshops in the United States, beginning in 1906. So that I am not speaking from any theory in regard to the matter. Now, I appear here, not only for the workers, but for the civilized manufacturers. The civilized manufacturers try to maintain decent standards of wages and hours, and are continuously at the mercy of the uncivilized manufacturers. Not only is the decent manufacturer involved—not only is the worker involved, but the decent manufacturer is involved. I will leave a study with the Judiciary Committee covering cer-

tain shops in the United States, in which garments are made. There is no use in going into detail here, because that should be put into the record, and it can all be checked up by you.

The exhibit shows that two things occurred: Not only does the uncivilized manufacturer prey upon the civilized manufacturer, but the worker is the victim. Not only is the worker affected by the loss of a legitimate Government contract in the factory of his employer, but the whole standard of the industry comes down.

The members of the committee read the report of the N. R. A. yesterday on wages and standards since the N. R. A. went out of existence; perhaps you noticed in the cotton-garment trade that 75 percent of the establishments have put down wages and put up hours since the Supreme Court found the N. R. A. unconstitutional, and it is particularly with the garment trades that this bill in reality has to do, because in the heavy industries the record will show you do not have the same conditions to face. After all, the garment industry is the sweatshop industry.

For over 35 years, a group of us have worked and worked and worked to break down the hold that the sweatshops had, and to protect the legitimate manufacturers. * * *.

Mr. HEALEY. Mr. Erwin, do you believe that the existing law which requires contracts be let to the lowest responsible bidder accentuates the condition you have just testified to?

Mr. ERWIN. Do I believe——

Mr. HEALEY. That the fact that the existing law requires that a Government contract

be let to the lowest responsible bidder accentuates that condition?

Mr. ERWIN. I should not say it is a matter of belief, I should say it is a matter of knowledge, Mr. Chairman. I could name 50 factories, that I know something about, that have now Government contracts, and I would say to you that the conditions in those factories—that the conditions we face in those factories that are in a contractual relation to my organization, would be disgraceful to civilization.

Mr. HEALEY. To what do you attribute that?

Mr. ERWIN. To absolutely uncontrolled competition. It goes to the lowest responsible bidder, and they would go to the little town and use little girls to do the work on the garments that our soldiers wear. * * *

[Hearings, Part 2, pages 266–70.]

STATEMENT OF WILLIAM GREEN, PRESIDENT, AMERICAN FEDERATION OF LABOR

Mr. GREEN. * * * Now, I wish, for the benefit of the record, to make just a brief statement. First, under the present law, the Government is forced to award contracts for work or supplies to the lowest, responsible bidder, the only requirement being that what is considered "responsible" is the ability of the bidder to furnish a bond. Now, anyone securing a Government contract, by paying a premium to a bonding company, of course, is able to furnish a bond. So under the present law contracts are going to those employers and contractors who work their employees long hours, for low rates of pay. Now, this naturally creates a situation unfair and detrimental to the em-

ployers, those fair employers, as well as to their employees.

I concede the Government to be the model employer. The Government represents all of the people, and I think it is the desire of all classes of people to establish and maintain our living and social standards at a high level. The labor organizations, of course, are continuously fighting and struggling in an effort to establish the wage rate on a high basis as high as the industry can afford, and to establish fair and tolerable conditions of employment, reduce the number of hours, so that we can spread employment among a larger number of people.

Now, if the Government is not to be the model employer, then who is to be the model employer in our country? If, through the Government, we insist that the standards and wages shall be fair and reasonable and high, and the hours reasonable, and the conditions tolerable, it is expected that the Government will first set the example for private industry to follow. Now, the reverse has been true, because, under our law, and under the policy pursued by the Government contracts are awarded for Government supplies and Government services to the lowest bidder.

That means that the employer, or he who gives service, that can manufacture goods cheaper and cheapest, and can give service cheaper or cheapest, gets the business from the Government.

Now, it is an economic fact that the man who can put wages on the lowest possible level, or can establish hours of labor at the highest maximum point, can produce cheaper than the man who attempts to maintain decent standards.

Now, we are fighting for the man who is humane in establishing decent standards, decent wages, decent hours, and decent conditions in employment, the elimination of sweatshop conditions, the abolition of child labor. I feel that this Government, under those circumstances, should not support any employer, or buy goods from any employer, who produces the goods or services under substandard conditions; and the principle embodied in this bill is to make the Government the model employer. I do not mean that the Government shall be exploited or be required to pay unreasonable prices for services or goods, but that the Government shall pay such prices as will guarantee and permit the establishment and maintenance of decent wages, decent standards, and with the elimination of sweatshop conditions and the abolition of child labor.

This situation now being considered has been recognized for some time by our Government—not only the present administration but previous ones recognized that such a state of affairs existed, as outlined above, and as the result endeavored to correct the situation by enactment of several pieces of legislation.

[Hearings, Part 2, pages 360–1.]

STATEMENT OF HON. FRANCES PERKINS, SECRETARY OF LABOR

Secretary PERKINS. Mr. Chairman, I am very glad to have the opportunity this morning of coming here to say that I personally believe that this Healey bill which is before you is a very important step and rests upon practices which are already familiar to the Government. After all, the principle involved is the same as that in the Davis-

Bacon Act, namely, that the Government should be a model employer and that those who work directly for the Government should receive the prevailing rate of wage and work the number of hours, and under conditions which are regarded by the community as being the best.

At the present time in Government contracts, where you have only the indirect employer rather than the direct employer, any conditions may prevail with regard to labor standards. The only fixed standards are the price and the quality of the goods which are ordered. Those are fixed definitely in the specifications. It seems clear, therefore, that the Government could require the conditions desired of the person who makes the articles which the Government is about to purchase, and by including those conditions in the contract could provide in advance the labor standards or health standards that it might wish to impose with regard to the conditions under which the articles are made. Therefore, if this bill becomes law it will relieve this very embarrassing and anomalous situation where the Government is urging employers to maintain good standards of living and good standards of work for their employees.

Of course, it is primarily the function of my Department to utilize educational means of one sort or another to encourage employers in the United States to pay a good standard of wages, to adhere to a reasonable limitation of hours, not to employ children, and not to allow employees to work under conditions which are not sanitary or safe. This is part of the duty and function of the Department of Labor under its basic law.

Many employers throughout the country, as you know, have endeavored to maintain good working conditions and are continuing to do so.

On the other hand, in letting its contracts for manufactured articles by giving the lowest bidder an advantage and making no provision whatever for the wages that he pays or the working conditions under which the goods are made, or the hours of labor, the Government is encouraging less scrupulous employers to lengthen hours and to tolerate very undesirable working conditions as a means of economy.

This has always been a very serious matter, and I think most of us have, with some embarrassment, seen goods being made for the United States Government under conditions which would not be tolerated by any fair-minded person who was making a study of decent labor standards.

It would seem, however, that the passage of this bill would enable the Government to be a model employer with respect to labor standards. As you know, there are today a great many manufacturers who cannot bid on Government work because of the fact that they have a contract with the unions which they live up to and which requires them to pay certain wages and to work certain hours.

For years they have been inhibited from bidding on Government work because they know they cannot get it. When they do bid they are far above the lowest bidder and, therefore, are unable to get that particular class of work. Thus lower standards are encouraged.

[Hearings, Part 2, pages 222–3.]

STATEMENT OF MISS MARY ANDERSON, DIRECTOR WOMEN'S BUREAU, UNITED STATES DEPARTMENT OF LABOR

* * * * * *

Miss ANDERSON. I am Mary Anderson, Director of the Women's Bureau of the Department of Labor, and I wanted to place in the record for the committee a few complaints that we have had in the Department of Labor in regard to Government contracts being let to contractors with low paid workmen.

Mr. HEALEY. Have those complaints been investigated?

Miss ANDERSON. Most of them are complaints, and some are investigations, not investigations in regard to Government contracts, because we have not investigated that, but this is what has come out during investigation.

Here is one respecting laundry work in southern Illinois. Illinois adapted a minimum wage law, and the minimum wage commission was set up, and they set a certain wage throughout the State for the laundries. Then came the Government contract to be let for seven C. C. C. camps, and this contract was let through a small dry cleaner who lived in Illinois, but who let out the work to Kentucky, where there were no labor standards or where there was no legislation or no minimum wage. They underbid the Illinois laundrymen all the way through, and they complained to the minimum wage commission in Illinois, and said that fully 50 percent of the $8,000 would have gone to labor if the contract had been let to the Illinois laundrymen.

Then they go on and say—this is the complaint of the southern Illinois laundrymen:

"While the Government seems to want to raise wages, they are the worst offenders. We have given you every cooperation in this entire matter, and we are now asking relief through your influence. At least 40 employees in southern Illinois will lose their jobs and some will go on relief."

This was in 1935, and just a very few months ago that contract was relet to the same laundryman that had it before, through this man in the small dry-cleaning establishment.

Then we go on to Pennsylvania. In July 1935, a worker in a garment factory in Pennsylvania, employed on a Government contract, asked the Secretary of Labor to do something about conditions under which the girls work, from 8 a. m. to 6 p. m. and most of the time to 8 p. m., being paid as low as $3 a week, and sometimes $6, $9, or $13. Refusal to work until 8 p. m. means loss of job.

Then we have another one in New Jersey, on a Government contract for pants. In July 1935 a worker in a New Jersey plant making pants for C. C. C. use reports that operators are being paid as low as $6 a week on these Government orders, and requests the Secretary of Labor to investigate.

Mr. DUFFY of New York. Was that investigated?

Miss ANDERSON. There was nothing that we could do about it.

Mr. DUFFY of New York. I mean was it investigated?

Miss ANDERSON. It was investigated and found to be true, but there was nothing else that you could do about it.

Now, let us go to Maryland. In August 1935 the Secretary of Labor was appealed to by an employee of a shirt company in Maryland working on Government contracts and paying as low as 10 cents an hour, most employees receiving only $2 or $3 a week for 52 hours of work.

Ohio: In August 1935 employees of a garment factory in Ohio making mattress covers for a C. C. C. camp wrote the Secretary of Labor asking relief from a situation under which they were paid a maximum of $1 a day and as low as 50 cents for a 9-hour day on a Government contract, though formerly receiving $2.80 a day for an 8-hour day.

Mr. HESS. What part of Ohio was that from?

Miss ANDERSON. It does not say here. We usually do not give the company. I do not know just what part of Ohio. I can find that out.

California: In November 1935, the Secretary of Labor was appealed to by a worker in a retail shop operated by a company that had orders for machines for Federal projects. Though 40 hours had been the standard workweek, a 48-hour week was now being initiated, resulting in loss of employment.

Then we have Tennessee: A large knit-underwear mill employs 1,200 women and 500 men. The firm was still maintaining the code rate of $12 a week, but through October, November, and December of 1935, were working daily hours of 9 and 10, and weekly hours up to 57 for the women and even longer for some of the men. This firm had a large C. C. C. camp order and were working at breakneck pace to get it out as rapidly and as cheaply as possible.

Then we have manufacturers of pencils which, since the outlawing of the codes, have increased their working hours from 40 to 50 and are paying the same weekly wage for 50 as for 40 hours under the code.

Raincoats: On an Army contract, for C. C. C. coats, after the codes were dropped, wages have been materially cut. Due to a strike and the formation of a union by workers, the rates had been raised again to code standard and 40-hour weekly schedule resumed.

Mr. DUFFY of New York. Was that case in Tennessee also?

Miss ANDERSON. Yes.

Here is a laundry in Tennessee that had been awarded the laundry contract for a Government marine hospital or camp. The rate was so low that at the end of the year the owner decided not to enter any bid. Several other laundrymen agreed on the price they would offer to take the contract. When the bids were submitted the officer in charge decided that there had been collusion among the bidders and threw all of the bids out and told the contractor he was to keep the work for another year at the same price. He objected and was given a slight increase, but said that the rate was so low that one could not pay even the going rate of 14 cents an hour and make a profit on the contract.

Mr. HEALEY. And this was also from Tennessee?

Miss ANDERSON. This is from Tennessee.

Mr. HEALEY. You do not know what part of Tennessee?

Miss ANDERSON. No.

Mr. CHANDLER. I am glad. [Laughter.]

Miss ANDERSON. It is not different from a great many other States, though.

Mr. CHANDLER. I would like to say this, however, for the benefit of the Ninth Congressional District, that not any of those things occurred in that district, because we do not have mills of the kind mentioned by Miss Anderson, and also the marine hospital at Memphis last year began—that is, on July 1, 1935—the operation of its own laundry for the linen of the hospital, so I know it cannot be in my district. * * *

Miss ANDERSON. It seems to me that this bill would do the necessary thing in regard to Government contracts. We feel very strongly in the Government, those of us that come in contact with this problem, that the Government on the one hand is trying to raise the standards of living throughout the country, as well as standards for the employment of workers, and on the other hand, because we cannot help ourselves, we are obliged to give the Government contracts to the lowest bidders, which in many instances means sweatshop conditions, so that we are really contradicting ourselves within the Government. We know that there are employers that will take these contracts on a low bid, and that that low bid is mostly made on what he can get his labor for.

For that reason, it seems to me that it would be very helpful to the Government all the way through to have some check on this question.

Mr. HEALEY. Thank you very much.

Mr. CHANDLER. Do you refer those complaints to the State labor department?

Miss ANDERSON. Yes; we do.

Mr. CHANDLER. The complaints about Tennessee have been referred down there?

Miss ANDERSON. Yes; we refer complaints of that kind to the State.

Mr. CHANDLER. They would be very glad to cooperate with the Women's Bureau in correcting those things.

Miss ANDERSON. Oh, yes. Your commissioner of labor is a very excellent person.

Mr. HEALEY. I will say, Mr. Chandler, that we have had complaints from many States of a similar nature.

[Hearings, Part 2, pages 442–6.]

STATEMENT OF A. B. SALANT, PRESIDENT OF THE NATIONAL WORK-SHIRT MANUFACTURERS ASSOCIATION

Mr. SALANT. * * * We object to Government contracts being given to concerns that are guilty of practices like the following:

Most of the awards for underwear for Government departments have been given in the past few years to the Naetex Manufacturing Co. This is a trade name for Mr. Herman Zoob, whose office is in New York and who operates a free plant in South Carolina, manufacturing underwear. He is also the owner of 100 percent of the stock of the Brookland Manufacturing Co., which for many years has operated and still operates a contract for convict labor in the manufacture of underwear in the South Carolina Penitentiary at Columbia. When a Government contract for underwear is awarded to him he fills it in his free plant and transfers the private work to the penitentiary. Indirectly, therefore, it is the award of the Government contract that enables the penitentiary operation to continue.

We should like to suggest that there be a provision in the Healey bill similar to that of the law of Canada which prohibits not only the importation of convict-made goods,

but also the importation of goods from any concern, any part of whose production is prison-made. Mr. Zoob, for example, cannot export to Canada even the production of his free plant.

Our objection lies to the awarding of Government contracts to concerns guilty of such practices as those of the Reliance Manufacturing Co., at its plant in Montgomery, Ala., which is operated under the name of the Southland Manufacturing Co.

This corporation—a very large one with a net valuation of between six and seven million dollars—has since 1924 used either all or practically all of the output of the Alabama State Prison cotton mills at Kimberly, Ala. It neither manufactures nor processes cotton shirts or underwear or any other of its products in prison, but it does make up work garments from prison-made cloth or piece goods produced at the Alabama State Prison.

Most of the Government awards to this corporation during the past few years have been for flannel shirts, underwear, and pants, so that it is probable that millions of dollars' worth of the Alabama prison-made products has been delivered under the awards granted it by the Government. We submit that as long as it is able to lower labor standards by the use of prison-made raw material, enabling it to get business away from competitors whose labor standards are better, the Healey bill should meet a situation like this. We should like to point out that there are concerns getting Government contracts who operate the so-called vocational training schools in Mississippi. Concerns in this class are the Philips-Jones Co., which has gotten awards

for millions of garments in the past year, and the Reliance Manufacturing Co. We need not enter here into a full description of the manner in which these schools have been operating—paying no wages whatever for periods ranging anywhere from 6 weeks to 6 months and then paying about $3 to $3.50 a week on the ground that the buildings in which they work are schools and are maintained at public expense. Recent investigations have shown that these are factories privately owned for which, in many cases, the Public Works Administration has given funds for building, and the United States Office of Education, for the maintenance. A full description of this practice is to be found in an article by Raymond Gram Swing in The Nation for July 3, 1935; also an article in the New York Times by Louis Stark, December 22, 1935. A provision in the Healey bill which would prevent any part of the Government from awarding contracts to concerns having less than a stated minimum wage or more than stated maximum hours would, we think, be heartily welcomed by nearly all manufacturers, irrespective of what their view might be about trade practices.

[Hearings, Part 2, pages 529–30.]

STATEMENT OF DR. COURTNEY DINWIDDIE, OF THE NATIONAL CHILD LABOR COMMITTEE

It seems to me that the essence of the matter is this: That there are certain standards of wages and hours under which it practically impossible for people to live as human beings; and that they are also bound to destroy the very industry in which they are practiced. The purpose of this bill, as I understand it, is to see that the Government

does not lend itself to perpetuating such conditions, but, rather, that its influence be on the other side.

[Hearings, Part 2, page 193.]

STATEMENT OF JOHN P. FREY, PRESIDENT, METAL TRADES DEPARTMENT, AMERICAN FEDERATION OF LABOR

Mr. FREY. * * * The department has had much experience in connection with contracts let by the Government for the supplies that it purchases. We have found from experience that the employers whom we designate as fair in their general attitude toward their employees and toward their associates are frequently denied the opportunity of securing a contract because they are not the lowest bidder. We find from experience that the lowest bidder is frequently that type of employer who not only pays the lowest wages and works the longest hours and is the least considerate of his employees' welfare, but who, in addition, carries on business methods that are—well, at least, reprehensible. And the so-called fair employer is unable to secure a contract because his very fairness prevents him from submitting the lowest bid.

[Hearings, Part 2, page 211.]

STATEMENT OF MISS LUCY R. MASON, GENERAL SECRETARY, NATIONAL CONSUMERS LEAGUE

Miss MASON. * * * I travel all over the country in my job. I have to travel through the Southern States trying to work out legislation there. Constantly I come across evidences of the pushing out of industry from the old industrial center to new locations, seeking cheap labor, and being

given all sorts of inducements in the way of actually having factories built without cost to them sometimes, and taxes free, no taxes for 5 years. But the chief inducement at the same time is an abundant cheap supply of labor.

If the Government goes into a contract with a broker in New York, who in turn is letting the goods out, not to any firm in the old industrial section, and not to any firm in the new industrial sections which are maintaining high standards, because many of them are—a lot of the firms have quite decent standards—but into some other area that we are talking about and letting them out to concerns where they can escape labor unions and labor restrictions, where they can exploit labor, it seems to me that it is a moral responsibility of the Government to avoid having that sort of thing; that the Government should avoid being particeps criminis to that sort of procedure.

[Hearings, Part 2, page 190.]

STATEMENT OF HON. DAVID I. WALSH, UNITED STATES SENATOR FROM MASSACHUSETTS

Senator WALSH. And also the breakdown that has come since the abolition of the N. R. A. The Government has an obligation. Let us take the case of sweaters. The Government has a contract for furnishing sweaters tomorrow, we will say. Who is going to get the contract? The sweatshop operator, of course. Just as sure as you are alive, the factory that is working under sweat-shop conditions will be the lowest bidder, and the one in Texas and the one in North Carolina that is trying to maintain these conditions will be absolutely lost. Under present law the one who chisels the most,

the one who works his employees the longest, who pays the lowest labor, will get every one. And the most enthusiastic supporters of all of this bill are those who have had Government contract experience—the builders. Practically every road builder and every constructionist in this country is very strong for this bill, because they have learned from sad experience what happens when you go to chiseling on wages.

[Hearings, Part 1, page 16.]

Senator WALSH. To me the strongest argument for this bill, one of the strongest, and which answers one of the arguments that have been made, is, namely, it would create a monopoly, that the big industries would get this business and would have the advantages, because they could adopt minimum wages and maximum hours more easily. The fact of the matter is that a monopoly now get these jobs, and it is going to grow and grow and grow into all Government contracts. All contracts are going to the sweatshops, because the present law requires the lowest bidder, and the lowest bidder means the lowest wages and the longest hours. That is a primary factor. Now that is the situation.

Are we going to allow that monopoly to grow up in this country, to tear down and destroy the advance and progress made, or are we going to say, the Government is going to save and preserve some of the things that have already been accomplished by putting in its contracts that invisible item of the human element and bring out in the open what the conditions of the workers are?

* * * * *

The boot and shoe industry is being wiped out in the boot and shoe centers of Massa-

chusetts. How? Why? First of all, it is not a monopoly. It is one industry that is in serious and wide and general competition, in small units. They are moving up to New Hampshire; they are moving up to Maine; they are moving into other rural parts of my own State and paying one-half the wages that are paid in the localities where the labor organizations have been able to demand and exact a living wage.

That is going to increase, and those people are going to get these contracts, and these concerns that have honestly and really been trying to maintain these conditions are going to, one after the other, be destroyed, regardless—I say regardless—of Government contracts. A bill of this kind would at least give them encouragement to hold on a time.

[Hearings, Part 1, pages 116–117.]

STATEMENT OF SIDNEY E. CORNELIUS, MANAGER, MANUFACTURERS' ASSOCIATION OF HARTFORD COUNTY, CONNECTICUT

Mr. CITRON. Is it not true that the clothing and textile firms in Connecticut—and I do not know that you realize this, because you may not have many in your county—have such high standards with respect to the elimination of child labor and with respect to home work, minimum wages, and so on, that they have hardly any possibility of competing with places which permit firms to have sweatshop conditions, child labor, convict labor, and so on?

Mr. CORNELIUS. I heard about that, that textile companies were vociferous in their desire to embrace the N. R. A., which we were not. There probably exist conditions

within that industry that I am not familiar with, even though I am acquainted with the manufacturers.

Mr. CITRON. As a matter of fact, that is one of the reasons why we, in New England, have lost so many textile factories, because they left for other sections of the country which at the time had not the stringent child-labor laws that we have up there?

Mr. CORNELIUS. That is what I understand, and because of the fact that there was a differential even in the codes between the wages paid in the South and in the North.

Mr. WALTER. The primary reason was to find a cheap labor market.

[Hearings, Part 2, page 336.]

STATEMENT OF WILLIAM P. CONNERY, REPRESENTATIVE IN CONGRESS FROM MASSACHUSETTS

Mr. CONNERY. * * * I admit I feel a selfish point of view there. I am thinking of the interests of the shoe industry in Lynn, in the textile industry in Lawrence that pay decent wages. I think they have 40 in shoes, but I would like to see it 30 hours, because they cannot employ all of the people they have, but they are competing with other sections of the country in shoes with Missouri; in textiles with the Carolinas, where they pay low wages and work long hours. On a Government contract, I would like to see them go in and say, "Here, you Carolina and Missouri, you have got to pay decent wages like I pay." And, "We believe in higher wages, shorter hours, we believe in better education, and better living conditions, and because we believe that, we think you should do it, too."

[Hearings, Part 2, pages 282–3.]

APPENDIX D

The following extracts from the debate on the avis-Bacon Act, indicate the nature of the prac-ces which Congress was there attempting to ppress.

Extracts from Cong. Rec., 71st Cong., 3rd Sess., ol. 74, Part 7:

Mr. LAGUARDIA. * * * I have only a few minutes. I want to say that every contractor who understands his business when he makes his estimate, bases the estimate on the prevailing rate of wages. Every contractor does that. The unfair and unethical contractors however, after getting the contract and being paid on such basis, turns around and imports labor from other localities at low and reduced prices, not only exploiting his own workers, but all to the discrimination and disadvantage of labor living in that vicinity. Let me make this clear. The contractor invariably is paid by the Government on the basis of prevailing rates but does not do so. Therefore this bill is for the protection of the Government and the workers (p. 6510).

Mr. BACON. * * * A practice has been growing up in carrying out the building program where certain itinerant, irresponsible contractors, with itinerant, cheap, bootleg labor, have been going around throughout the country "picking" off a contract here and a contract there, and local labor and the local contractors have been standing on the sides lines looking in. Bitterness has

been caused in many communities because of this situation.

This bill, my friends, is simply to give local labor and the local contractor a fair opportunity to participate in this building program.

I think it is a fair proposition where the Government is building these post offices and public buildings throughout the country that the local contractor and local labor may have a "fair break" in getting the contract. If the local contractor is successful in obtaining the bid, it means that local labor will be employed, because that local contractor is going to continue in business in that community after the work is done. If an outside contractor gets the contract, and there is no discrimination against the honest contractor, it means that he will have to pay the prevailing wages, just like the local contractor.

* * * * * *

The contractor on all Government jobs must conform to the prevailing wages in that community. He cannot shave that price, but he must pay the prevailing wage. The Government must not be put in the position of helping to demoralize the local labor market.

* * * * * *

To permit the Federal Government to aid in the disruption of stable labor conditions is not fair or decent. Nor is it fair or decent to permit practices that discriminate against the local contractor or the general contractor who does not believe in taking advantage of demoralized labor conditions in any community in which he may operate (p. 6510, 6511).

Mr. COCHRAN. * * * Two great buildings, a Federal office building and a new post office, involving an expenditure of nearly $10,000,000, are to be constructed in my city, St. Louis. I would like to see those buildings constructed by a St. Louis contractor and by St. Louis labor. This law will apply and the local contractor will not be required to compete with a foreign contractor who, if he secured the contract, would be required to import cheap labor. What would result if cheap labor was brought into my city? It would be resented, and trouble would result (p. 6512).

Mr. MEAD. * * * With consumption falling far behind production and resulting in economic stagnation, it is our chief concern to maintain the wages of our workers and to increase them wherever possible. Wages should be maintained, and especially on Government work, for to fail in this regard would be setting a bad example for private enterprise and permitting a gross injustice to be perpetrated upon our citizens. This bill is a step in the right direction and should pass at this session of Congress (p. 6513).

Mr. GRANFIELD. * * * I am particularly interested in this legislation for the reason that Wednesday of this week bids were opened for the construction of a post office in the city of Springfield, which is in my district. This contract is to be awarded to a firm from Chicago. Other post-office projects under this program, I expect, will be allocated some time in the future. I am anxious that this policy of regulation be established at this time by our Government to protect those projects. This legislation will compel the contractors to pay the pre-

vailing wage scale in the vicinity of the building projects and will prevent the importation of labor from distant points at wages far below the prevailing rates.

* * * * * * *

For instance, a contractor coming from Chicago, as is the case with the Springfield, Mass., project, if he is forced to pay the prevailing wage rate in the city of Springfield, he will be inclined to engage workmen who reside in that city. To follow this course would be the sensible one in order to avoid the expense he would incur in the transportation of labor from Illinois to Massachusetts. The contractor and the Government would receive the fruits of contented labor, and the people in the particular location where the project was under construction would not be forced to sit in idleness while strangers came into their community to engage in employment that was rightfully theirs. The practice of importing cheap labor is an affront to the man who is willing and able to work.

* * * Our Government has always fostered the ideal that the standard of living during this depression should be conserved and maintained, and that it is the duty of every contractor in America to subscribe to this policy (p. 6513, 6514).

Mr. KOPP. Mr. Speaker and ladies and gentlemen of the House, we have been passing through a period of depression and unemployment and to aid in relieving the situation the Government has entered upon a very extensive public building program. It has been the desire of the President and of the administration generally to maintain the existing wage rates. Under the law, however, the Government has been compelled to

award the contracts for public buildings to the lowest responsible builders. This has enabled contractors who had recruited cheap labor to go into communities where higher wage rates prevailed and outbid the local contractors. As a result, the local contractors have not had a fair chance, and local workmen have often been compelled to walk the streets while strangers have done the work.

Not only have the cheap wage rates paid to imported workmen made it possible for their employers to secure public building contracts, but they also have had a strong tendency to depress the wage rates generally in the communities where public buildings have been constructed.

The purpose of this bill is to require the contractors, including subcontractors, to pay not less than the "prevailing rate of wages for work of a similar nature in the city, town, village, or other civil division of the State in which the public buildings are located, or in the District of Columbia, if the public buildings are located there." * * * It is simply insisted that the Government shall not use its power to demoralize the wage rates in places where public buildings are constructed * * * (p. 6515).

Mr. McCORMACK. * * * The main purpose of this bill is to compel, by indirection, contractors awarded Federal building contracts to pay those whom they employ the "prevailing wage scale" in the district or community in which construction work is being done. By accomplishing this the bill also brings benefits to those contractors who, in submitting bids, intend and desire to pay a decent wage to those whom they may employ. It will force the contractor who here-

tofore has used cheap, imported labor to submit bids based upon the payment of the "prevailing wage scale" to those employed. That is as it should be. It will thereby enable honorable and decent contractors to submit bids with the knowledge that, so far as wages is concerned, the unfair competitor of the past no longer exists. It compels the unfair competitor to enter into the field of fair competition. It also compels such contractors to pay a living wage and, of necessity, to give consideration to the employment of local labor (p. 6516).

Mr. FITZGERALD. I am for this bill. I am for it not only because organized labor is for it, but I am for it because of the bitter experience of my home city, Dayton, Ohio, in the erection of the new Hospital at the Central Branch of the Soldiers Home. The contract for this more-than-a-million-dollar construction went to a corporation from a distant State. Subcontracts for work and material went to remote places. The contractor had obtained the contract by competitive bidding. He intended to make a profit. He was entitled to make a profit. There was nothing in his contract to compel him to pay the prevailing rate of wages although that is a settled Government policy where the Government engages in construction without the intervention of contractors. Men were lured from distant places to work on this new hospital, the construction of which started about May 1, 1930. Thousands of men were already out of work in the city. The situation was acute. Would it have been less than human for the contractors to take advantage of the depression to get the work done cheaply; to beat down the local standard of wages and demoralize labor

conditions by hiring those from distant points who were willing and eager to take less and crowd out the local people? Not only did the labor organizations protest, but the Builders' Exchange, the local contractors, and more significant than all, the officers of the community chest, who could foresee at the termination of the work, these people from miles away stranded as derelicts on the community for our already outraged people to support.

* * * * *

Local standards of wages and living must be upheld and it is by such a law as we here propose that we may accomplish what we seek (pp. 6517, 6518).

Mr. CONDON. * * * Much harm and injustice have already been done by greedy and unprincipled contractors who have taken advantage of their freedom from such restraint as here proposed to exploit the desperate unemployed by transporting laborers and tradesmen to distant points in order to employ them at starvation wages far below the scale in effect in the locality where the Government building is being erected. Thus a program which this Congress authorized to aid the unemployed and distribute widely throughout the country opportunities for local employment has been perverted into an instrument of oppression. By the transportation of low-paid labor from distant points local labor has been unfairly and unjustly deprived of the opportunity which Congress intended to provide in its behalf. Not only have the local unemployed suffered thereby but those already employed in such localities have been threatened with a lowering of their scale of wages because of the

depressing effect of the importation of this cheap labor.

As I see it, we must pass this bill or stand condemned as furnishing a powerful bludgeon for the use of these unprincipled contractors to browbeat labor and force other honest and legitimate contractors to resort to lower wage sales to meet this unfair competition. In fact, the conditions in this bill ought to have been made an integral part of the emergency building-program legislation which we enacted at the very outset of this session. We cannot undo the harm that has already been done by our failure to foresee and provide against the abuses which we now know exist, but we can by favorable action here today prevent future injustices.

I am intensely interested in doing all I can by my vote to get such legislation enacted immediately because of several very important projects about to be awarded in my State. I am especially anxious that there shall be no importing of cheap outside labor into Rhode Island at wage scales under those generally prevailing there. If such a thing should happen, I know that the people of my district, far from looking upon the construction of a Federal building as a boon to the district, would view it as a distinct and most unfortunate calamity. I have had letters from reputable contractors and from labor leaders in my district who fear this very thing, and not without just cause, as the facts brought out in this debate today well illustrate. The news of these abuses related here would seem to have traveled far and wide, and with good reason (p. 6519).

APPENDIX E

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington.

B-8876 MARCH 5, 1940.

The Honorable THE SOLICITOR GENERAL,
Department of Justice.

DEAR SIR: I have the letter of your Department dated February 16, 1940, referring to that part of the work of this office involving consideration and decision by the Comptroller General of questions respecting the legality of actions of Government purchasing and contracting officers in the preparation of specifications, advertising for bids and awarding of contracts, etc., and requesting to be advised of the approximate number of cases of this character considered in the course of a year with data indicating whether the request for determination came from a bidder or from a Government department and the nature of the legal question involved.

During the calendar year 1939 there were received and considered 457 of such cases, of which 283 were presented by the heads of Government departments and establishments, 23 by Government disbursing officers and 151 by bidders.

Of this total of 457 cases, some containing several questions, division is made as follows to show the nature of the questions involved:

Whether advertising for bids is required	18
Whether bids substantially complying with specifications may be accepted	8
Whether bids presenting alternate proposals may be considered	4

Acceptance of bids containing stipulations of unusual conditions	2
Whether bids may be changed or corrected as to matters affecting price or withdrawn because of alleged errors therein or modified as to terms and conditions	300
Evaluation of difference in delivery time and award to other than a low bidder because a higher bidder offers a shorter delivery time	10
Determination of low bidder when freight costs to the Government are considered	14
Making of award when all bids are identical	9
Whether higher bid may be accepted when ability of low bidder to comply with specifications is in question	89
Whether lump sum bid may be accepted when separate bids were requested on different units or classes of supplies	4
Opening of bids received after hour of opening	7
Whether low bids may be rejected because unresponsive to the specification requirements or because of unresponsibility of the bidders	18
Protests claiming specifications are unnecessarily restrictive of competition	72
Whether bids conditioned on agreement by the Government to certain tax clauses may be accepted	4
Questions respecting applicability of the provisions of the following acts and contractors' compliance therewith:	
Davis-Bacon Act	4
Walsh-Healey Act	5
Eight Hour Act	1

The foregoing information was prepared from case record cards without reference to the decisions and other communications representing the action of this office but it is believed to be substantially correct. It should be understood that it does not include the many such questions which arise during the course of a year in connection with the work of auditing disbursing officers' accounts and the settlement of claims.

Respectfully,

R. N. ELLIOTT,
Acting Comptroller General
of the United States.

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CLERK

No. 593

In the Supreme Court of the United States

OCTOBER TERM, 1939

FRANCES PERKINS, INDIVIDUALLY AND AS SECRETARY OF LABOR OF THE UNITED STATES; CHARLES V. McLAUGHLIN, INDIVIDUALLY AND AS ASSISTANT SECRETARY OF LABOR OF THE UNITED STATES; L. METCALFE WALLING, INDIVIDUALLY AND AS ADMINISTRATOR OF THE DIVISION OF PUBLIC CONTRACTS OF THE DEPARTMENT OF LABOR OF THE UNITED STATES; ET AL., PETITIONERS,

v.

LUKENS STEEL COMPANY, A CORPORATION; ALAN WOOD STEEL COMPANY, A CORPORATION; SOUTH CHESTER TUBE COMPANY, A CORPORATION; ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL STATEMENT FOR THE PETITIONERS

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v.

LUKENS STEEL COMPANY, A CORPORATION; ALAN WOOD STEEL COMPANY, A CORPORATION; SOUTH CHESTER TUBE COMPANY, A CORPORATION; ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL STATEMENT FOR THE PETITIONERS

On pages 147–152 of their brief petitioners set forth certain data with respect to the geographic distribution of bidders and sources of supply in 72 steel contracts awarded by various government agencies during the 6 months period immediately

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preceding the date of the minimum wage determination for the iron and steel industry. Typewritten tabulations of the data analysed and discussed in petitioners' brief were filed with the Clerk of this Court and submitted to counsel for respondents. Thereafter, with assistance furnished by counsel for petitioners, counsel for respondents commenced examination of the actual bids on the contracts involved. Counsel for respondents raised numerous objections to the accuracy of the tabulations filed by petitioners and consequently to the accuracy of the maps and the analysis which were based upon these tabulations. The objections to the accuracy of the tabulations upon which the maps and the analysis were based fall into three categories:

"1. Counsel discovered a number of clerical errors in the names and location of bidders and sources of supply. For example, in reporting one bid of the Bethlehem Steel Company, the source of supply was incorrectly stated to be "Johnstown & Lebanon, Pa." instead of "Sparrows Point, Md.". In other instances, the name of one of the several bidders was omitted. The data contained in the tabulations has been rechecked against the original bids, and the revised tabulations, filed with the Clerk and submitted to counsel, reflect corrections of these clerical errors.

2. The second objection raised by counsel for respondents was that the materials called for by some

of the contracts dealt with in the original tabulations did not fall within the definition of products of the iron and steel industry as set forth in the determination of the Acting Secretary, and that therefore it was improper to draw conclusions as to the nature of the competition in the iron and steel industry from the bidding upon contracts for such materials as galvanized steel products. Further, counsel objected to the use of the bidding upon contracts for galvanized products to illustrate the so-called "alternative bid" phenomenon discussed in petitioners' brief, since this may merely indicate that the steel will be manufactured at one point and then shipped to another point where it will be galvanized.

In order to avoid all questions of this character petitioners have eliminated from their tabulations, maps and comment all bids for the manufacture or furnishing of galvanized steel products and machine forged steel flanges and reinforcing steel, cut and bent. The elimination of the bids for these products has reduced the number of contracts dealt with by the revised tabulations from 72 to 56.

3. A third source of some confusion may be traceable to the fact that many of the contracts under discussion embraced two or more "lots," on each of which the number and identity of the bidders may have varied and on each of which there might have been awarded a separate contract. In order to avoid any possible confusion which might

arise out of lumping of all the bidders on a single contract, in cases in which all of the bidders may not have bid upon all of the lots contained in the contract, the revised tabulations and maps have broken down each contract into its component lots. In some cases one or more lots within a single contract may call for products such as galvanized steel, which may not fall within the definition of the iron and steel industry. In such cases the lots containing the questionable products have been completely eliminated from the tabulations and from the maps.

This revision of the tabulations and maps does not affect the conclusions to be drawn from the material as originally submitted. The following should be substituted for the portion of petitioners' brief beginning with the first complete paragraph on p. 147 and extending through the first paragraph on page 150:

It seems unlikely that respondents will dispute the large area of competition found in government steel contracts.[1] But it may be well affirmatively to indicate its extent. The report of the Board summarizes and gives illustrative examples of government steel contracts which demonstrate "that the Government requirements for iron and steel are served by plants located in all parts of the

[1] See "Report of the Federal Trade Commission to the President in response to Executive Order of May 30, 1934, with Respect to the Basing-Point System in the Iron and Steel Industry," U. S. Government Printing Office, November 1934, pp. 14–18 and *passim*.

country" (R. 184, 185–188). An analysis has been made of the competitive bidding on 121 lots, each of which represent a separate case of competitive bidding, contained in 56 steel contracts awarded subject to the Public Contracts Act by the Navy Department, the War Department, the Panama Canal Zone, and the Bureau of Reclamation of the Department of the Interior during the six months' period immediately preceding the date of this determination.[2] This analysis shows that the locality here challenged (hereinafter called the "northeastern locality") is the smallest area within which, in advance of the award of a contract to any of the respondents, it can be determined that the contract will be performed.

Thus, on 43 lots, the competitive bidding on each of which might have resulted in the award of a separate contract, the bidders were distributed in varying degrees throughout the entire country. On the remaining 78 lots all of the bidders were located either in the northeastern locality or in the locality immediately to the west (hereinafter referred to as the "midwestern locality"), in which the prevailing minimum wage is also 62.5 cents per hour.

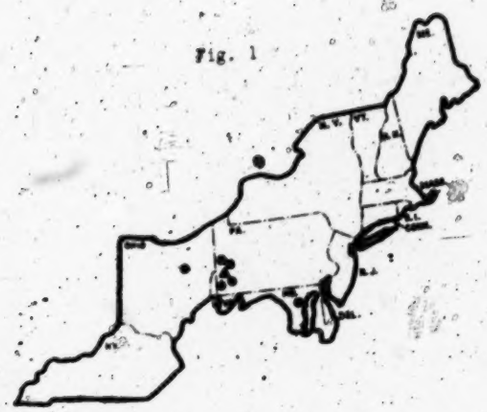
On 31 of the last-mentioned group of 78 lots, all of the bidders were located within the north-

[2] The data is taken from the files of the Public Contracts Division and the Departments involved; a typewritten summary has been filed with the Clerk and submitted to counsel for respondents.

eastern locality. As is shown on the map on the opposite page, depicting the bidding on 31 lots, the competition among bidders located throughout this locality was general on 30 of the 31 lots.[3] The phenomenon of "alternative bidding" indicated on several of the lots depicted brings home the facts that no area less extensive than this smallest discernible area of bidders would be appropriate to the accomplishment of the purposes of the Act. In Figures 7, 9 and 18, on this map, the connection of two or more points by a line indicates that a particular bidder stated in his bid that, if awarded the contract, steel would be supplied from any or all of the connected plants. Thus, even after the award of the contract, the place of performance might be determinable at the option of the lowest bidder. Clearly, the Congressional objective of rewarding rather than penalizing the high minimum wage manufacturer can only be accomplished by the determination of the uniform minimum wage prevailing throughout an area in which it is realistically possible to say that the "materials * * * are to be manufactured" and within which the payment of less than the uniform minimum standard may attract the place of actual performance away from the fair minimum wage standard employer.

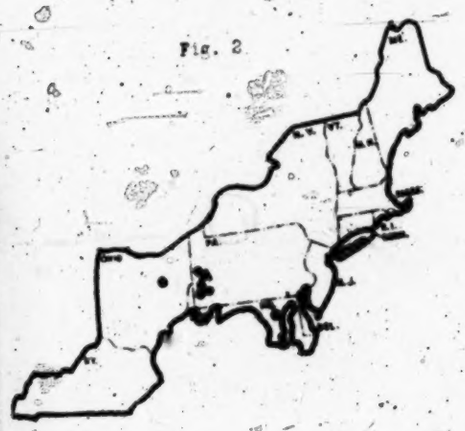
[3] On one of these lots—#189, Navy Contract reg. no. 7272—there was but one bidder and one source of supply.

Fig. 1



Navy Dept., Contract Reg. No. 6092, Lot 582 (Lot 585 2/)
No. of Bidders - 9
No. of Indicated Sources of Supply - 9

Fig. 2



Navy Dept., Contract Reg. No. 6093, Lot 583 (Lot 586 2/)
No. of Bidders - 9
No. of Indicated Sources of Supply - 9

Fig. 3

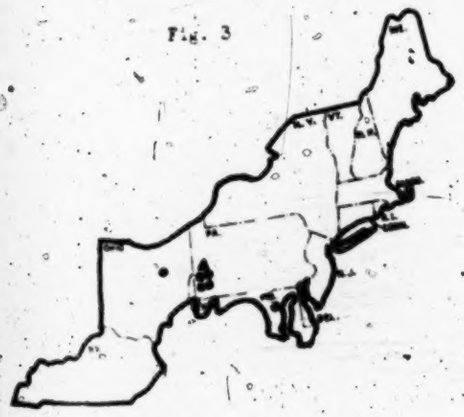
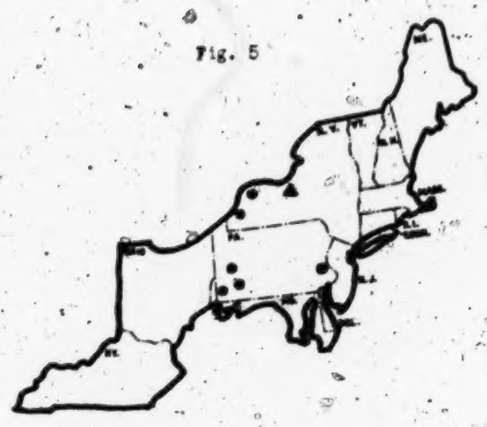
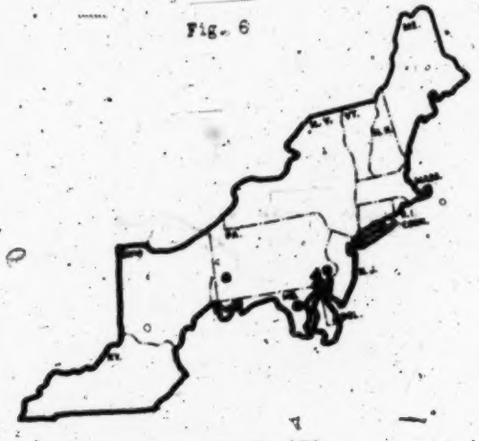


Fig. 5



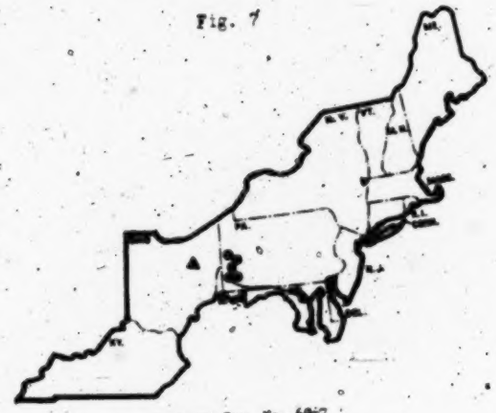
Navy Dept., Contract Reg. No. 6575, Lot 220
(Lots 221 1/ and 224 2/)
No. of Bidders - 8
No. of Indicated Sources of Supply - 8

Fig. 6



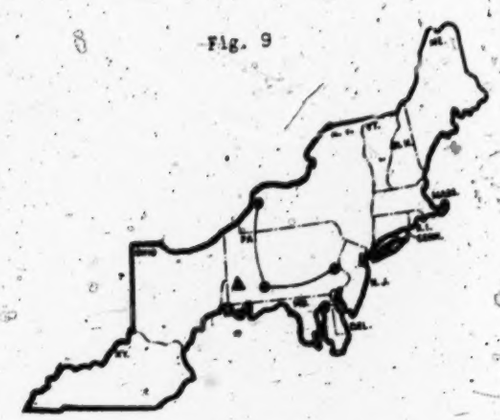
Navy Dept., Contract Reg. No. 6819
No. of Bidders - 6
No. of Indicated Sources of Supply - 6

Fig. 7



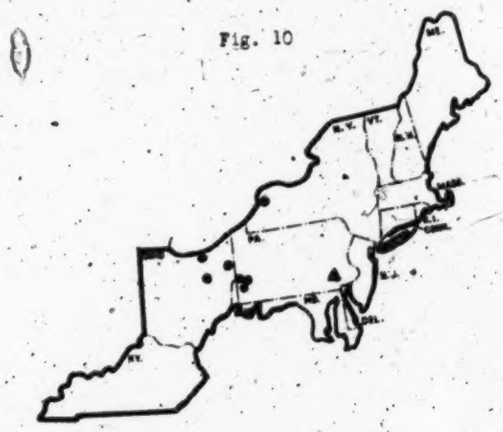
Navy Dept., Contract Reg. No. 6867

Fig. 9



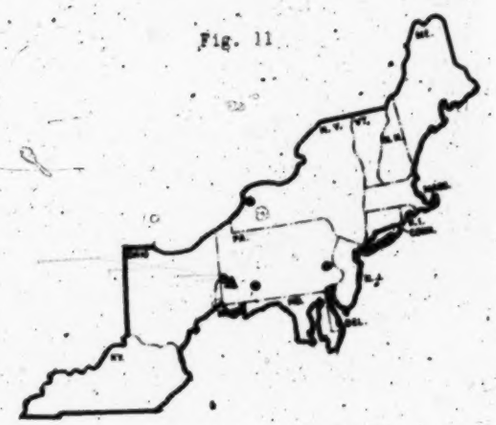
Navy Dept., Contract Reg. No. 7272, Lot 188
(Lot 1962/) (Lot 1972/)
No. of Bidders - 2
No. of Indicated Sources of Supply - 4

Fig. 10



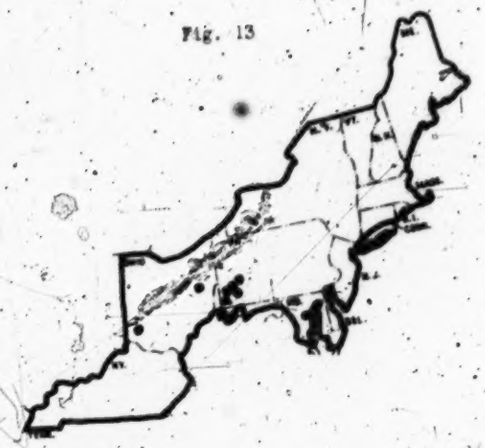
Navy Dept., Contract Reg. No. 7273, Lot 189
No. of Bidders - 13
No. of Indicated Sources of Supply - 8

Fig. 11



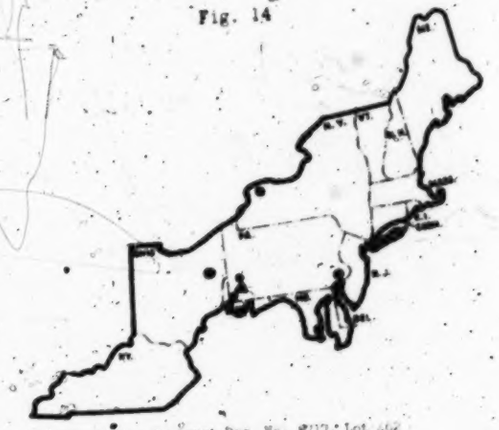
Navy Dept., Contract Reg. No. 7274, Lot 190

Fig. 13



Navy Dept., Contract Reg. No. 8713, Lot 467 (Lot 468 2/)
No. of Bidders - 8
No. of Indicated Sources of Supply - 8

Fig. 14



Navy Dept., Contract Reg. No. 8717, Lot 460
(Lots 461, 463, 464 2/)
No. of Bidders - 6
No. of Indicated Sources of Supply - 6

Fig. 15

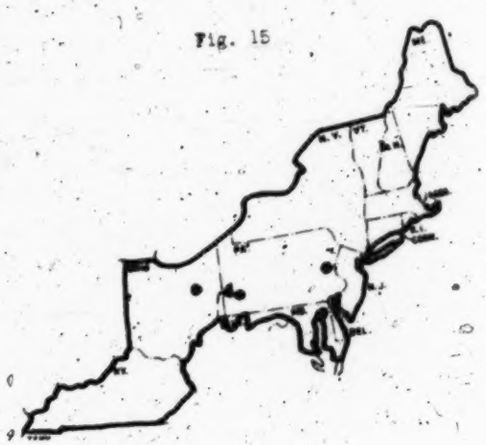
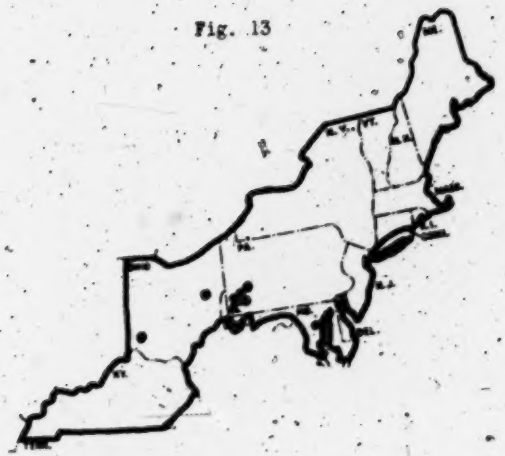
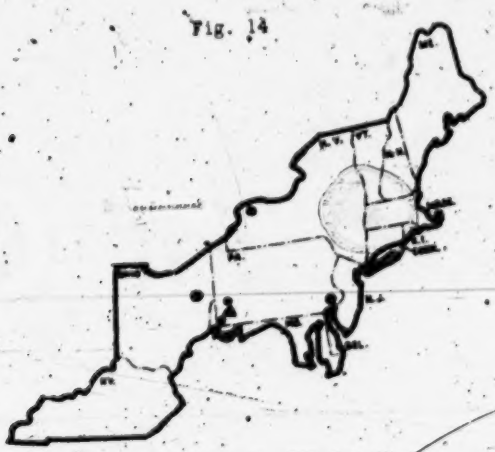


Fig. 13



Navy Dept., Contract Reg. No. 8713, Lot 467 (Lot 468[1])
No. of Bidders - 8
No. of Indicated Sources of Supply - 8

Fig. 14



Navy Dept., Contract Reg. No. 8717, Lot 462
(Lots 461, 463, 464[2])
No. of Bidders - 6
No. of Indicated Sources of Supply - 6

Fig. 15

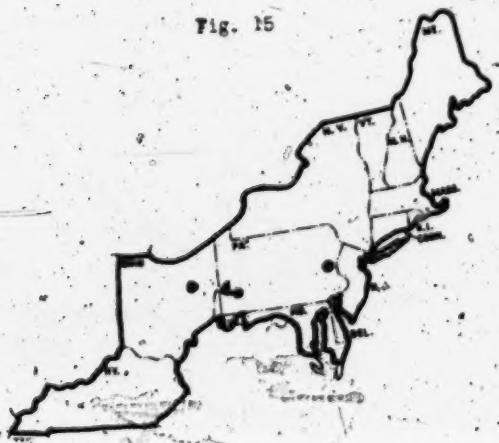
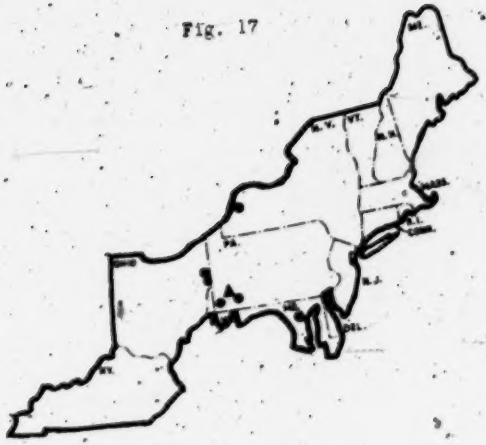
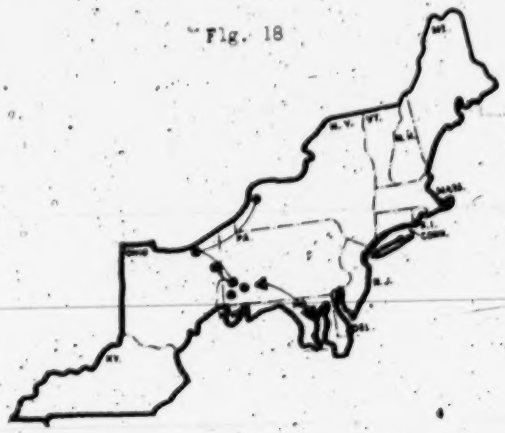


Fig. 17



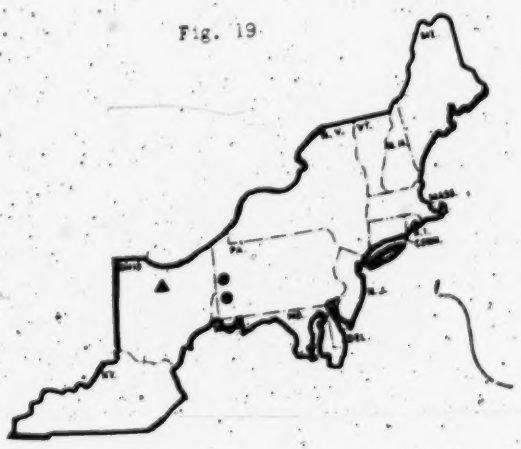
War Dept., Contract Reg. No. 7376
No. of Bidders - 9
No. of Indicated Sources of Supply - 9

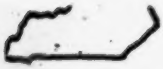
Fig. 18



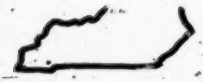
War Dept., Contract Reg. No. 8094
No. of Bidders - 9
No. of Indicated Sources of Supply - 12

Fig. 19



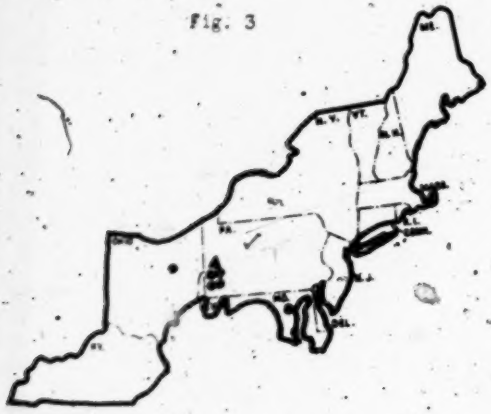


Navy Dept., Contract Reg. No. 6093, Lot 583 (Lot 586[2/])
No. of Bidders - 9
No. of Indicated Sources of Supply - 9



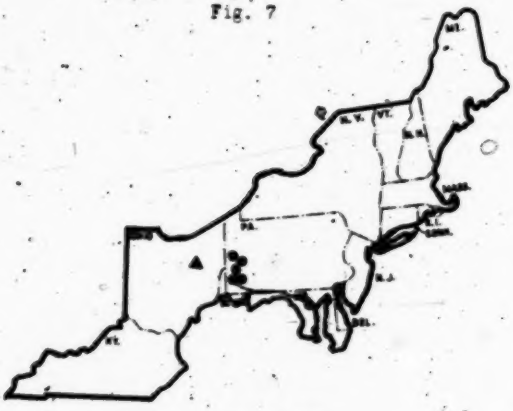
Navy Dept., Contract Reg. No. 6819
No. of Bidders - 6
No. of Indicated Sources of Supply - 6

Fig. 3



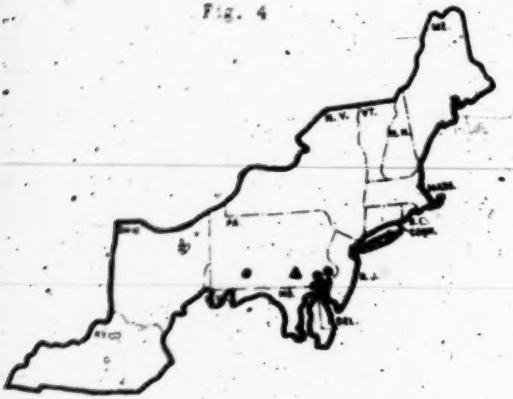
Navy Dept., Contract Reg. No. 6094, Lot 587 (Lot 584[2/])
No. of Bidders - 9
No. of Indicated Sources of Supply - 9

Fig. 7



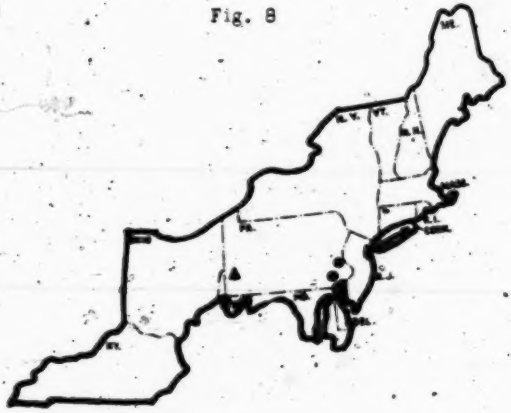
Navy Dept., Contract Reg. No. 6867
No. of Bidders - 7
No. of Indicated Sources of Supply - 7

Fig. 4

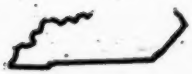


Navy Dept., Contract Reg. No. 6143, Lot 180 (Lot 191[2/])
No. of Bidders - 6
No. of Indicated Sources of Supply - 5

Fig. 8



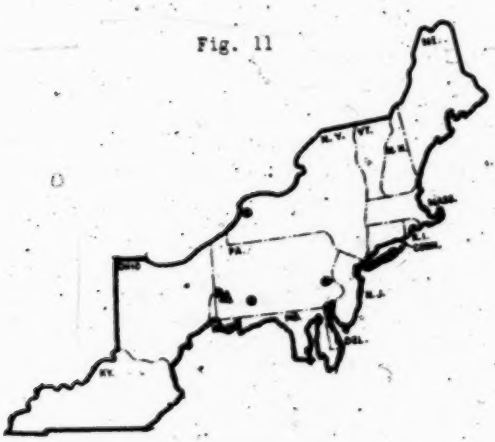
Navy Dept., Contract Reg. No. 7162, Lot 122
No. of Bidders - 4
No. of Indicated Sources of Supply - 4



Navy Dept., Contract Reg. No. 7273, Lot 185
No. of Bidders - 13
No. of Indicated Sources of Supply - 8

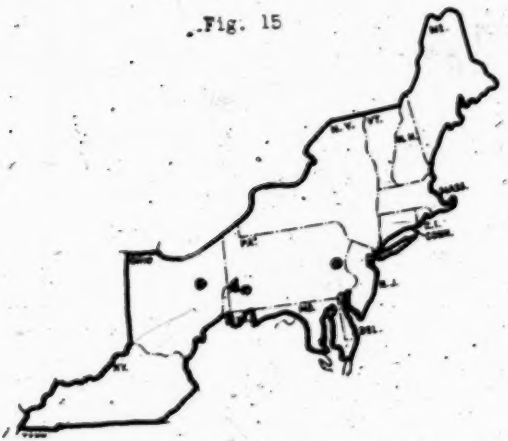
Navy Dept., Contract Reg. No. 8717, Lot 462
(Lots 461, 463, 464?)
No. of Bidders - 6
No. of Indicated Sources of Supply - 6

Fig. 11



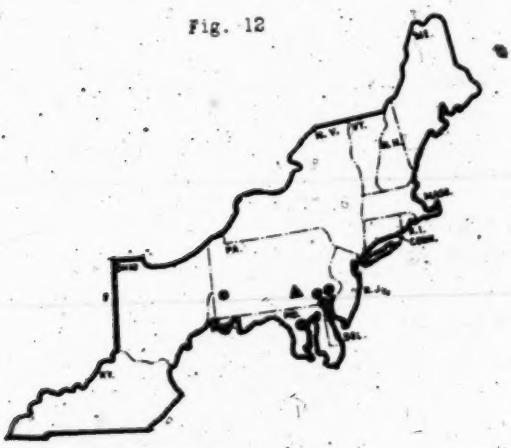
Navy Dept., Contract Reg. No. 7274, Lot 190
No. of Bidders - 5
No. of Indicated Sources of Supply - 7

Fig. 15



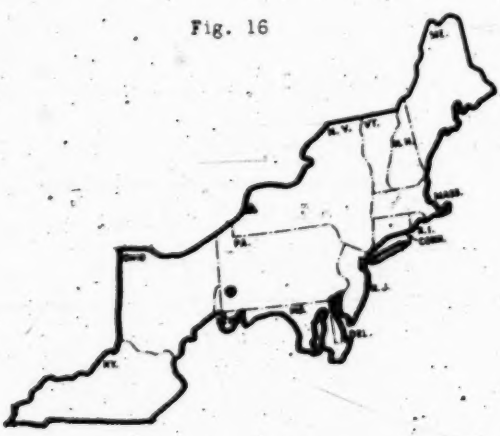
Panama Canal, Contract Reg. No. 6469
No. of Bidders - 4
No. of Indicated Sources of Supply - 4

Fig. 12



Navy Dept., Contract Reg. No. 7452, Lot 144
No. of Bidders - 7
No. of Indicated Sources of Supply - 7

Fig. 16

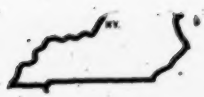


Interior Dept., Contract Reg. No. 7373
No. of Bidders - 2
No. of Indicated Sources of Supply - 2

A L D I S T R I B U T I O N O F S O U R C E S O F S U P P L Y

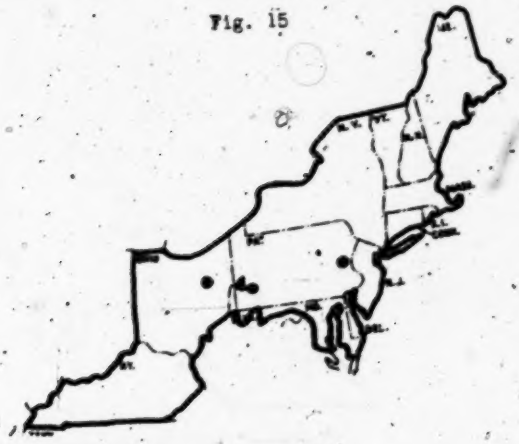
licated by Bidders on 31 Lots in Contracts for Iron and Steel Products
[illegible] 64 Interior Department and the Panama Canal

Navy Dept., Contract Reg. No. 8717, Lot 462
(Lots 461, 463, 464 2/)
No. of Bidders - 6
No. of Indicated Sources of Supply - 6



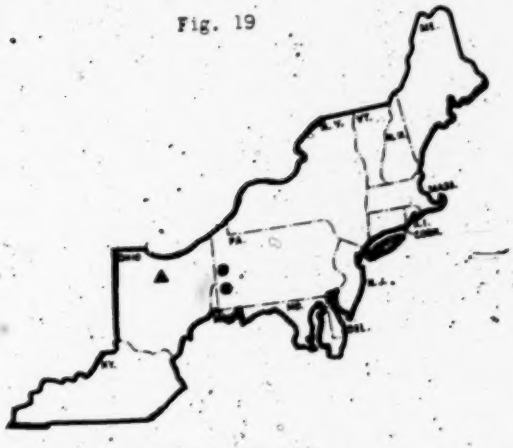
War Dept., Contract Reg. No. 8094
No. of Bidders - 9
No. of Indicated Sources of Supply - 12

Fig. 15



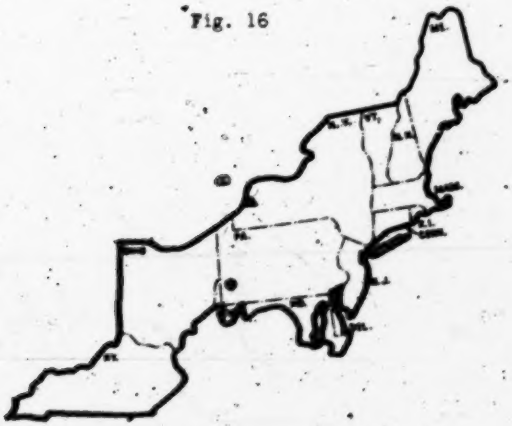
Panama Canal, Contract Reg. No. 6469
No. of Bidders - 4
No. of Indicated Sources of Supply - 4

Fig. 19



War Dept., Contract Reg. No. 9570
No. of Bidders - 3
No. of Indicated Sources of Supply - 3

Fig. 16



Interior Dept., Contract Reg. No. 7373
No. of Bidders - 2
No. of Indicated Sources of Supply - 2

LEGEND

▲ Indicated sources of supply of successful bidders.
● Indicated sources of supply of other bidders.
Interconnecting lines indicate alternative indicated sources of supply.

1/ Bidders identical with those on lot illustrated.

2/ All bids for these lots show points of production similarly distributed within the locality.

3/ One bidder and one source of supply.

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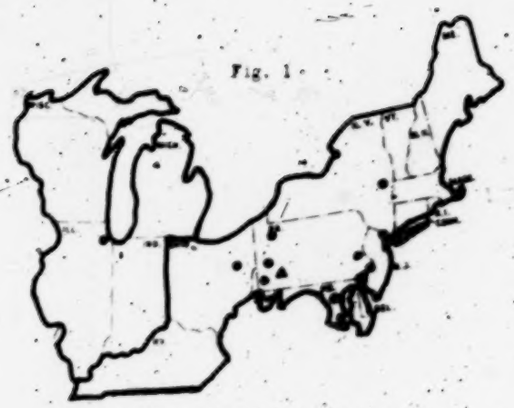
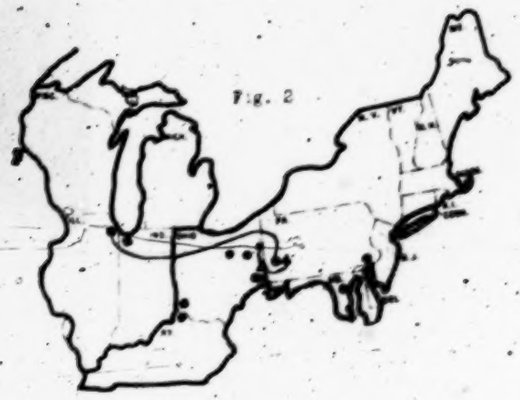
Fig. 1



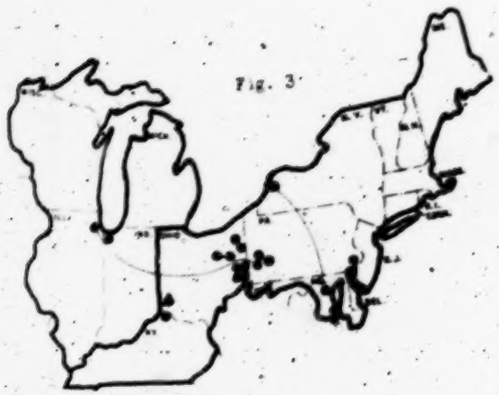
Navy Dept., Contract Reg. No. 6279, Lot 803 (Lot 806 2/)
No. of Bidders - 11
No. of Indicated Sources of Supply - 11

Fig. 2



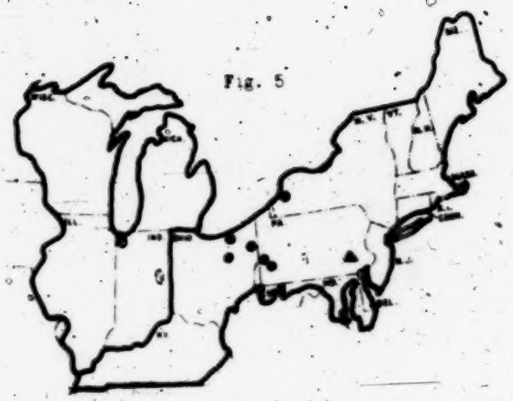
Navy Dept., Contract Reg. No. 6768, Lot 229 (Lot 231 2/)
No. of Bidders - 17
No. of Indicated Sources of Supply - 16

Fig. 3



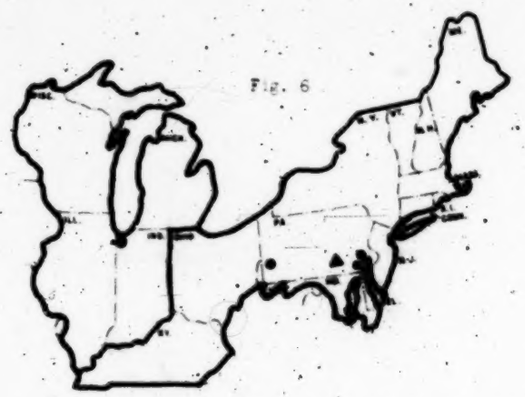
Navy Dept., Contract Reg. No. 6855, Lot 232
No. of Bidders - 16
No. of Indicated Sources of Supply - 18

Fig. 5



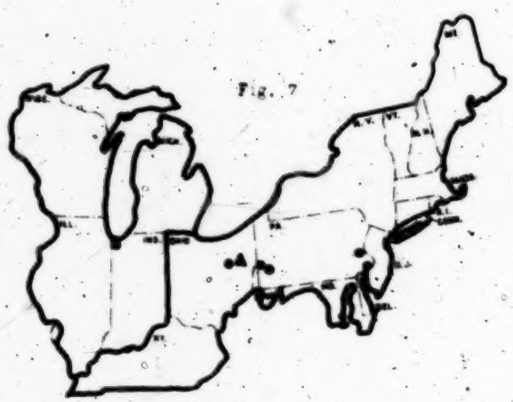
Navy Dept., Contract Reg. No. 7273, Lot 184 (Lot 183 2/)
No. of Bidders - 14
No. of Indicated Sources of Supply - 8

Fig. 6



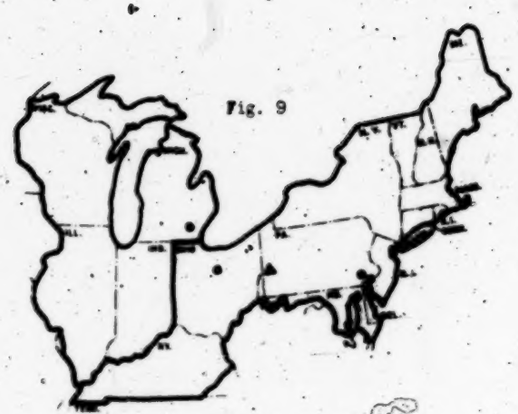
Navy Dept., Contract Reg. No. 7452, Lot 134 (Lot 135 2/)
No. of Bidders - 7
No. of Indicated Sources of Supply - 6

Fig. 7



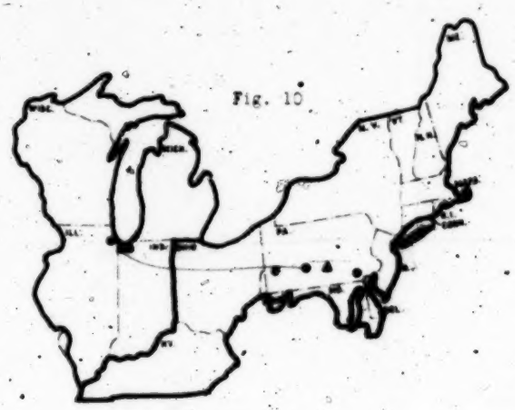
Navy Dept., Contract Reg. No. 7653
No. of Bidders - 8
No. of Indicated Sources of Supply - 7

Fig. 9



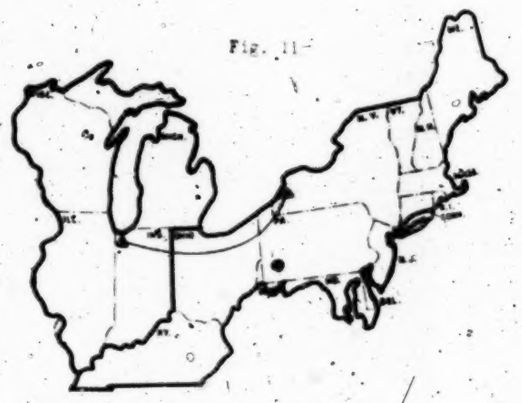
Navy Dept., Contract Reg. No. 9443, Lot 479 (Lots 480, 481 and 482 1/)
No. of Bidders - 7
No. of Indicated Sources of Supply - 5

Fig. 10



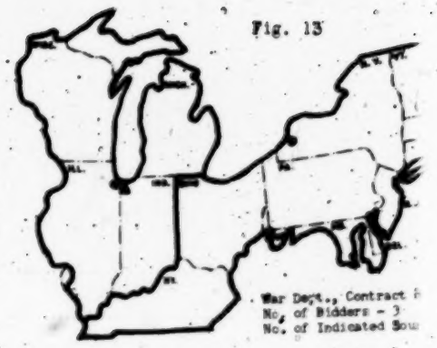
War Dept., Contract Reg. No. 6295
No. of Bidders - 8
No. of Indicated Sources of Supply - 7

Fig. 11



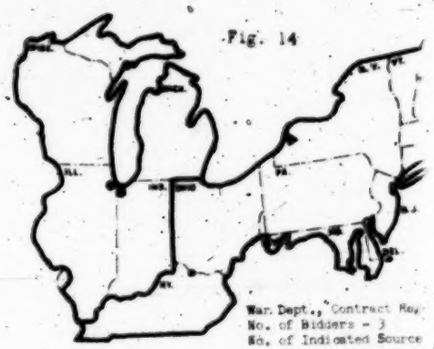
War Dept., Contract Reg. No. 6390
No. of Bidders - 3
No. of Indicated Sources of Supply - 4

Fig. 13



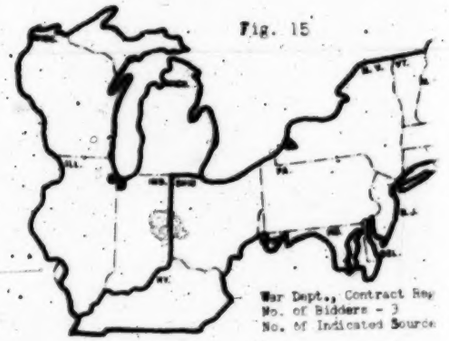
War Dept., Contract R
No. of Bidders - 3
No. of Indicated Sou

Fig. 14



War Dept., Contract Reg
No. of Bidders - 3
No. of Indicated Source

Fig. 15



War Dept., Contract Reg
No. of Bidders - 3
No. of Indicated Source

Fig. 16

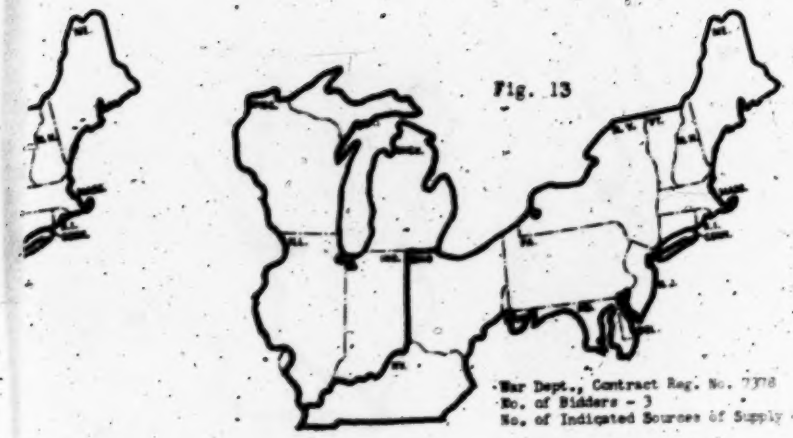


Fig. 13

War Dept., Contract Reg. No. 7378
No. of Bidders - 3
No. of Indicated Sources of Supply - 3

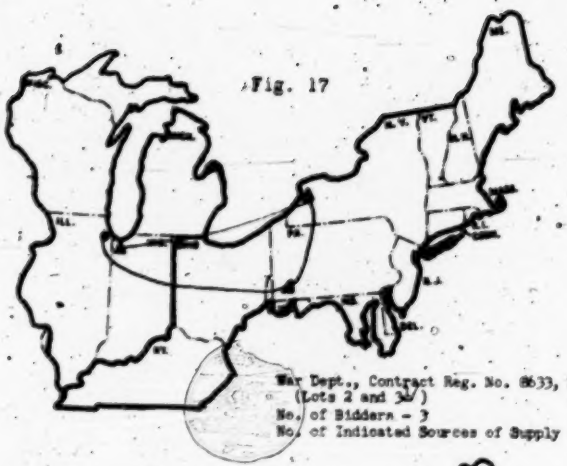


Fig. 17

War Dept., Contract Reg. No. 8633, Lot 1
(Lots 2 and 3 2/)
No. of Bidders - 3
No. of Indicated Sources of Supply - 3

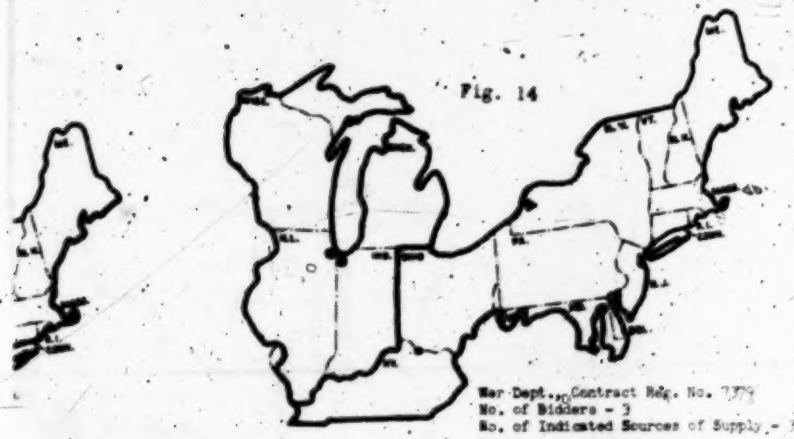


Fig. 14

War Dept., Contract Reg. No. 7379
No. of Bidders - 3
No. of Indicated Sources of Supply - 3

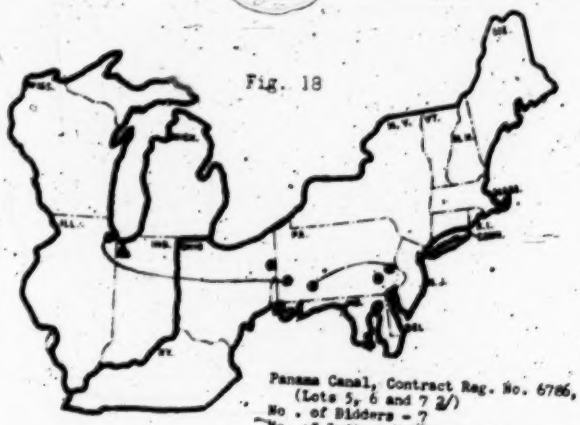


Fig. 18

Panama Canal, Contract Reg. No. 6786, Lot 3
(Lots 5, 6 and 7 2/)
No. of Bidders - 7
No. of Indicated Sources of Supply - 9

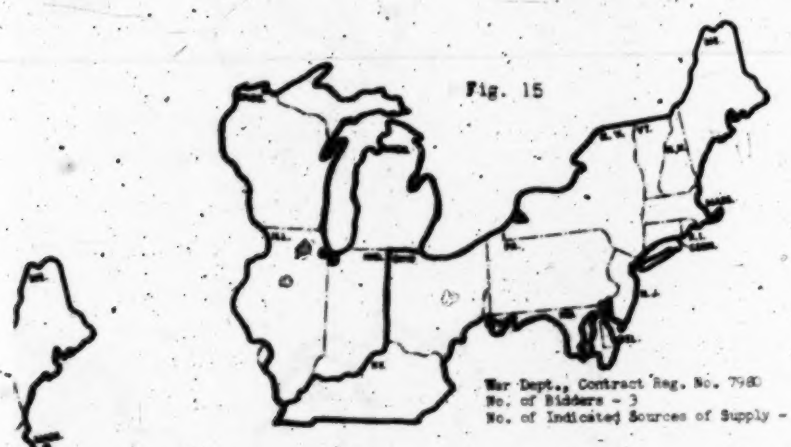


Fig. 15

War Dept., Contract Reg. No. 7980
No. of Bidders - 3
No. of Indicated Sources of Supply - 3

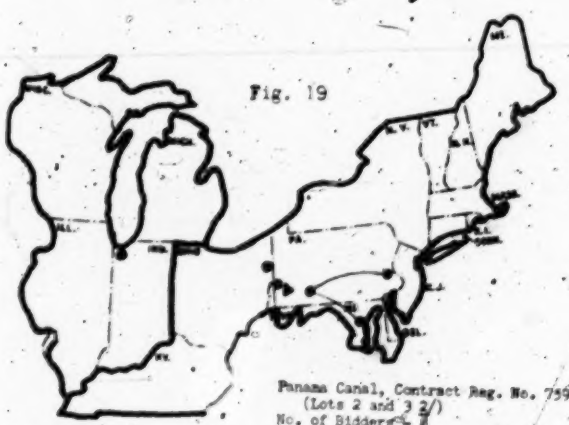


Fig. 19

Panama Canal, Contract Reg. No. 7599, Lot 8
(Lots 2 and 3 2/)
No. of Bidders - 8
No. of Indicated Sources of Supply - 8

Fig. 16

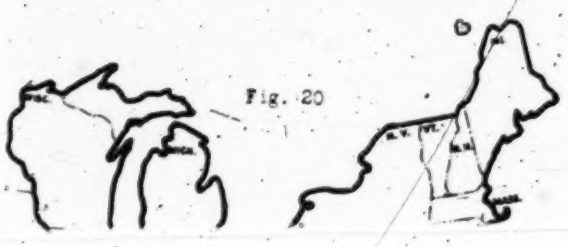
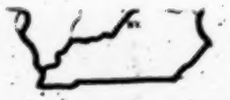


Fig. 20

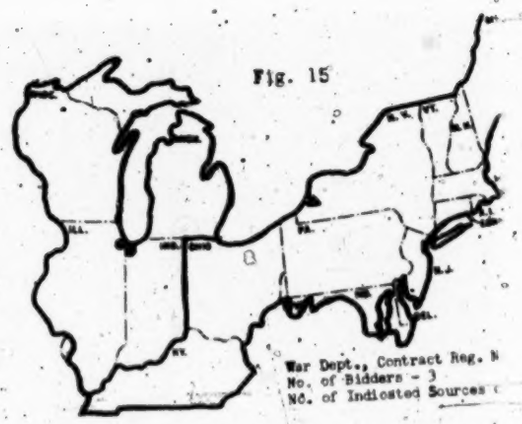
Navy Dept., Contract Reg. No. 6768, Lot 229
(Lot 231 2/)
No. of Bidders - 17
No. of Indicated Sources of Supply - 16



Navy Dept., Contract Reg. No. 7452, Lot 134 (Lot 135 1/)
No. of Bidders - 7
No. of Indicated Sources of Supply - 6

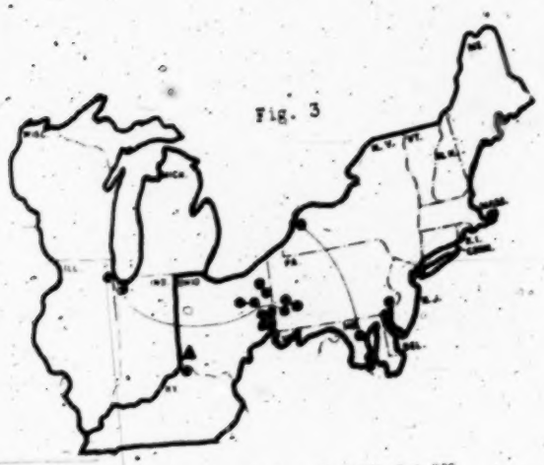
War Dept., Contract Reg. No. 6295
No. of Bidders - 8
No. of Indicated Sources of Supply - 7

Fig. 15



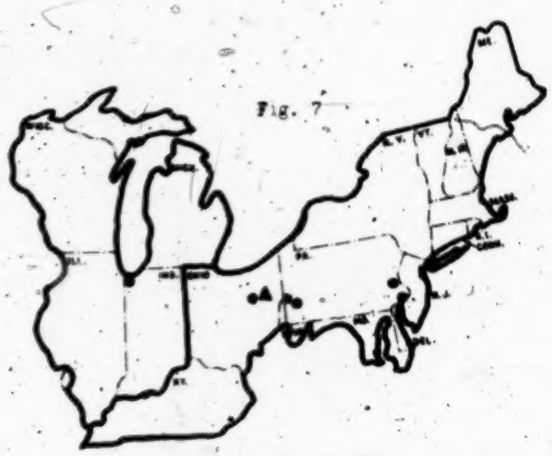
War Dept., Contract Reg. N
No. of Bidders - 3
No. of Indicated Sources

Fig. 3



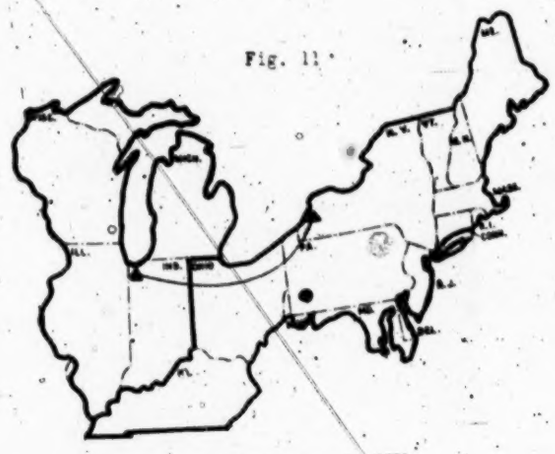
Navy Dept., Contract Reg. No. 6855, Lot 232
No. of Bidders - 15
No. of Indicated Sources of Supply - 18

Fig. 7



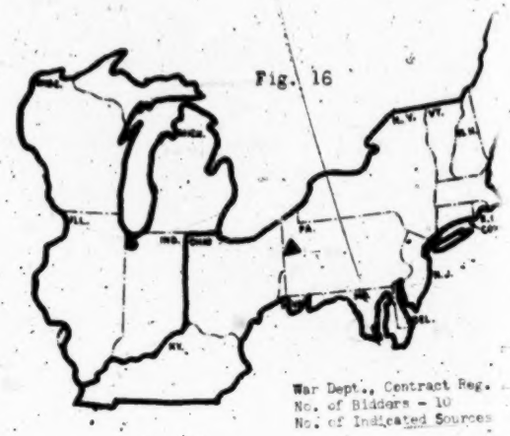
Navy Dept., Contract Reg. No. 7653
No. of Bidders - 8
No. of Indicated Sources of Supply - 7

Fig. 11



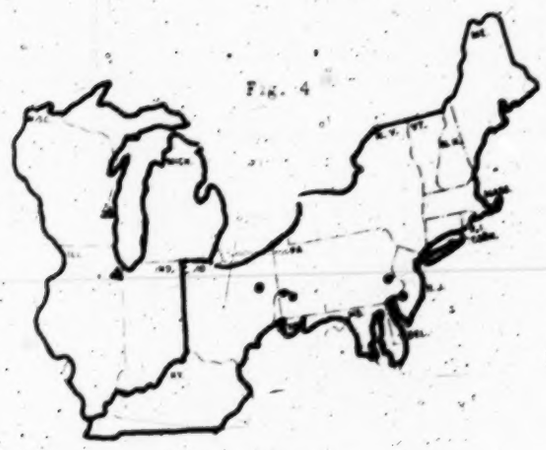
War Dept., Contract Reg. No. 6390
No. of Bidders - 3
No. of Indicated Sources of Supply - 4

Fig. 16



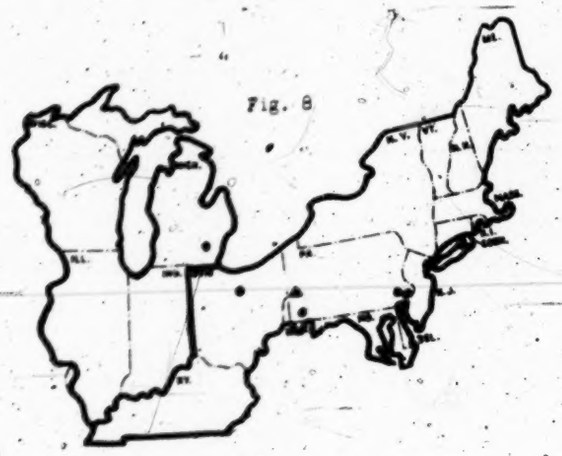
War Dept., Contract Reg.
No. of Bidders - 10
No. of Indicated Sources

Fig. 4



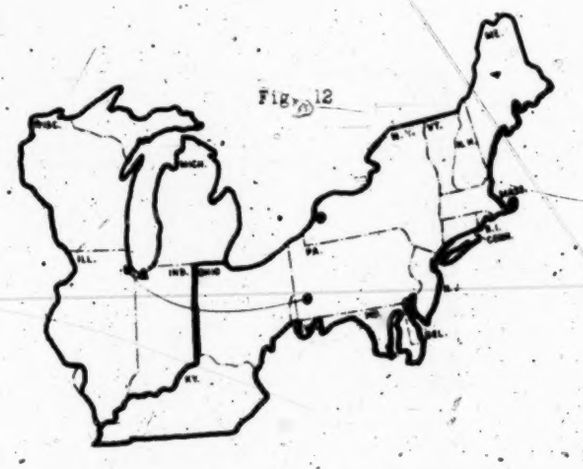
Navy Dept., Contract Reg. No. 7272, Lot 180
(Lots 173, 175, 176, 177, 178, 179, 181
and 182 2/) (Lot 174 1/)
No. of Bidders - 5
No. of Indicated Sources of Supply - 5

Fig. 8



Navy Dept., Contract Reg. No. 9442, Lot 882
(Lots 883, 884 and 885 1/)
No. of Bidders - 8
No. of Indicated Sources of Supply - 6

Fig. 12



War Dept., Contract Reg. No. 7241, Lot 1 (Lot 2 1/)
No. of Bidders - 5
No. of Indicated Sources of Supply - 4

GEOGRAPHICAL DISTRIBUTION OF SOURCES OF SUPPLY

Indicated by Bidders on 47 Lots in Contracts for Iron and Steel Products
Awarded by the Navy, War and Interior Departments and the Panama Canal
During the Period from January 1 to June 30, 1938

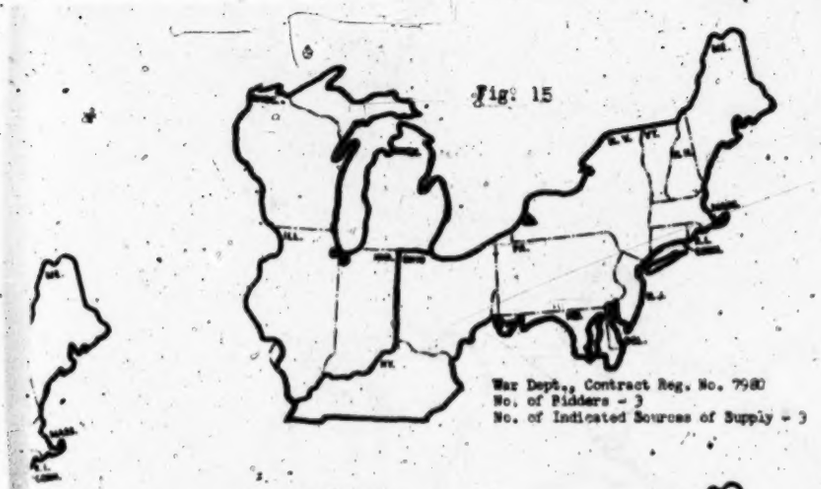


Fig. 15

War Dept., Contract Reg. No. 7980
No. of Bidders - 3
No. of Indicated Sources of Supply - 3

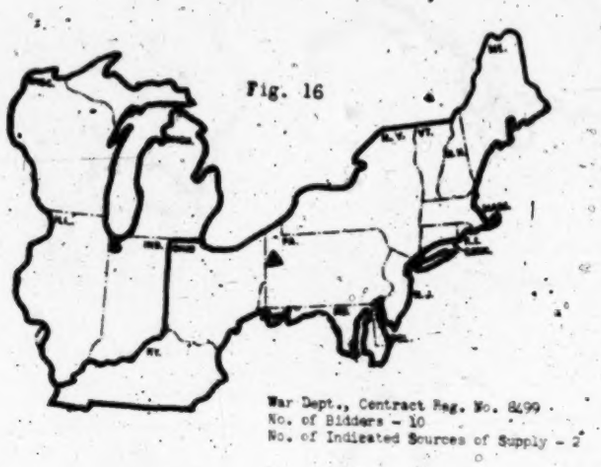


Fig. 16

War Dept., Contract Reg. No. 8499
No. of Bidders - 10
No. of Indicated Sources of Supply - 2

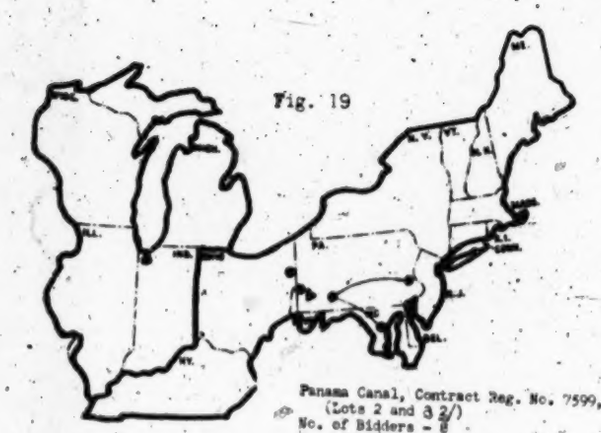


Fig. 19

Panama Canal, Contract Reg. No. 7599, Lot 8
(Lots 2 and 3 2/)
No. of Bidders - 8
No. of Indicated Sources of Supply - 8

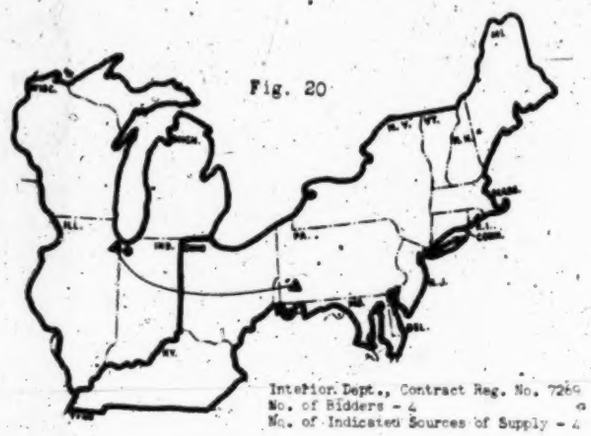


Fig. 20

Interior Dept., Contract Reg. No. 7269
No. of Bidders - 4
No. of Indicated Sources of Supply - 4

LEGEND

▲ Indicated sources of supply of successful bidders.
● Indicated sources of supply of other bidders.
Interconnecting lines indicate alternative indicated sources of supply.

1/ Bidders identical with those on lot illustrated.

2/ All bids for these lots show points of production similarly distributed within these localities.

3/ One bidder and one source of supply.

ES OF SUPPLY

U. S. GOVERNMENT PRINTING OFFICE : 1940—O- 220254

The map depicting the bidding on 47 lots indicates that on all but one of the 47 lots [1] the bidders were distributed throughout both the northeastern and the midwestern localities. Here, again, the prevalence of alternative bids strongly suggests the necessity of treating the entire area as a "locality" within which, in advance of the bidding, it is possible to say that a given contract will be performed.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

MARCH, 1940.

---

[1] On one lot—#174 on Navy Contract, reg. no. 7272—there was but one bidder and one source of supply. This lot, together with that mentioned in footnote 3, require revision of the sentence on p. 151 of the main brief, that on none of the contracts was bidding confined to an area as restricted as that urged by respondents.

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IN THE

Supreme Court of the United States

October Term, 1939

No. 593

FRANCES PERKINS, Individually and as Secretary of Labor of the United States, et, al., *Petitioners*,

v.

LUKENS STEEL COMPANY, a corporation, et al., *Respondents*.

RESPONDENTS' BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

WILLIAM CLARKE MASON,
O. MAX GARDNER,
FREDERICK H. KNIGHT,
HAROLD F. McGUIRE,
ROBERTS B. THOMAS,
Counsel for Respondents.

GIBSON BROTHERS, INC., Printers, Washington, D. C.

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IN THE

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FRANCES PERKINS, Individually and as Secretary of Labor of the United States, et, al., *Petitioners*,

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RESPONDENTS' BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

Opinions Below

The opinions of the United States Court of Appeals for the District of Columbia, the court below (R. 387-410), are reported in 107 Fed. (2d) 627.

Jurisdiction

The jurisdiction of this Court has been invoked under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

The Question Presented

The question presented is whether this Court should exercise its discretion to review a judgment (R. 410) of the

United States Court of Appeals for the District of Columbia, holding (R. 388, 405) that the complaint (R. 2-45), as amended (R. 313-318), of respondents, seven of the smaller eastern steel companies (R. 9), sets forth facts sufficient to constitute a claim[1] for injunctive relief in respect of (R. 42-44), and a declaratory judgment as to the invalidity of (R. 44), a determination (R. 239-254,—hereinafter called the Determination), by petitioner McLaughlin, as Acting Secretary of Labor,[2] which he purported to make pursuant to the Public Contracts (Walsh-Healey) Act,[3] and in which he purported to "establish" (R. 254) the minimum wages which members of the iron and steel industry desiring to bid on and enter into Government contracts must agree to pay to employees engaged in the performance thereof.

The court below held (R. 388-405) that the Determination was "not only unwarranted" by the Act "but incongruous" (R. 390) because so far beyond the jurisdiction and authority of the Secretary of Labor thereunder as to be "a palpable evasion of the letter and spirit of the pertinent statute" (R. 396-397) and "an attempt arbitrarily to disregard the statutory mandate" (R. 390).

The basis of such decision was that, whereas the authority of the Secretary of Labor under the Walsh-Healey Act is limited to the *ascertainment* of the prevailing minimum wage (for a particular industry, or for groups of industries, or for similar work, etc.) in each *"locality"* (i.e. local center of manufacture or community) in which

---

[1] The District Court had dismissed the complaint, as amended (R. 319-320).

[2] The Determination was made with the authorization, approval, consent and active participation of petitioner Perkins, Secretary of Labor (R. 24).

[3] Act of Congress approved June 30, 1936, Public No. 846-74th Cong.; 49 Stat. 2036-39, c. 881. Appendix (A-1), pp. 3-9.

specified government supply contracts are to be performed, the Acting Secretary in the Determination had attempted, *inter alia*, to *fix* a single minimum wage for the iron and steel industry in a vast *region* consisting of 13 states, part of a fourteenth, and the District of Columbia, and embracing a number of local centers of manufacture (including those in which respondents' plants are located) with lower prevailing minima, by the simple device of calling that vast region a "locality."

Reasons Why the Writ Should Not Be Granted

1. Petitioners have already had two days in court before an appellate tribunal, the court below. The first was before the full Court of Appeals of five members, on respondents' application for a preliminary injunction (R. 337-352), which was granted (R. 372) after extensive argument, oral and written (R. 371-372; 381; 355-356; 373-378), in which petitioners insisted that an "extraordinary showing" (R. 363) of "probable success on appeal" (R. 359) was required. The second was on the appeal proper, heard by three members of that court (R. 385). The ultimate issues in the case were thus before the court below on two occasions.[4] That they received the most careful consideration is shown by the scholarly and comprehensive opinion of Mr. Justice Miller (R. 388-405).

2. In view of the Court of Appeals' characterization of the Determination as a "palpable evasion" of the law "in the teeth of the statute" (R. 396-397) and the strong implication that it was deliberately disingenuous as well (R. 394; see pp. 11-12, *infra*), we feel justified in asserting that

[4] In each instance, Mr. Justice Edgerton was the sole dissenter (R. 372, 388). His dissent on the appeal was based primarily on procedural grounds (R. 406-410).

the administrative action in question is of the very type which tends to impede the development of administrative law by supplying the particular instance of glaring wrongdoing which casts doubt on the general process. Such action should not be encouraged, even temporarily, by further court review or accorded the opportunity thereby to protract litigation, on which it thrives by wearing down the citizen who seeks to protect his rights. These respondents have already been put to great trouble and expense in defending against this unjustified Determination, which threatened illegally to deprive them of their lawful right to bid and negotiate for Government contracts subject only to limitations imposed or authorized by Congress and to destroy their long existing business relations with the Government (R. 4-5, 37-38, 313).

3. Neither respondents nor the decision below have in any way obstructed the Government's contracting or purchasing activities, as suggested in the petition for certiorari (pp. 9, 13-14). On the contrary, the sole purpose of respondents' suit and the sole effect of the decision below were to remove an unlawful restriction on Government contracting, i.e., to prevent the imposition, through arbitrary action of a non-contracting officer, of a new and unlawful condition upon bidding for Government contracts, which condition was unrelated to the purposes of any contract and threatened to create a monopoly among the large, fully integrated and geographically well-placed steel plants, situated at Pittsburgh, Youngstown, Gary and Birmingham, whose wage rates were not affected by the Determination (R. 37-38; 171-173; 162). It is a matter of public record that Government purchasing machinery has not only functioned normally,[5] but has, indeed, functioned

[5] Captain C. W. Fisher, Construction Corps, United States

at an accelerated rate,[6] since the issuance by the court below of an injunction against the continued enforcement of the Determination.

4. There is no conflict between the decision of the court below and that of any Circuit Court of Appeals, and it is most unlikely that there ever could be any such conflict, since it would seem impossible for any court not sitting in the District of Columbia to obtain jurisdiction over a suit of this character.

5. The decision of the court below, in so far as it involves the provisions of the Walsh-Healey Act, is in obvious conformity with both the language of the Act and the clearly expressed Congressional intent. The rulings of the court below on procedural issues follow long lines of

---

Navy, testifying on May 13, 1939, with respect to S. 1032, 76th Cong., 1st. Ses., stated: "The minimum-wage determination in the iron and steel industry practically eliminated competition in the industry while it was in effect. The bidding on steel, while the minimum-wage determination was in effect, was confined to two bidders agreeing to the stipulations, and as only one of these could produce steel within the whole range required, the bidding was limited on some items to one bid. Bidding is now normal due to the temporary court injunction suspending this wage determination." Hearing on S. 1032, 76th Cong., 1st. Ses., p. 40.

[6] Bulletins Nos. 126 to 166 of the Division of Public Contracts of the Department of Labor show that during the 41 week period from March 27, 1939, the date of issuance of such injunction, to January 6, 1940, contracts subject to the Walsh-Healey Act for more than $56,000,000 have been awarded for iron and steel products. During the comparable periods June 10, 1938—March 26, 1939, and April 1, 1938—January 14, 1939, the amounts of such contracts for such products were approximately $25,000,000 and $28,500,000, respectively (Bulletins Nos. 85 to 125; 75 to 115).

decisions by this Court in analogous cases and the principles established therein.

The Specific Issues Raised By the Petition for Certiorari

The specific substantive issue raised by the petition is:

Was the Determination beyond the jurisdiction or authority of the Secretary of Labor under the Walsh-Healey Act?

The specific procedural questions thus raised are:

(a) Do the respondents have a standing to sue?

(b) Is the administrative action complained of subject to judicial review?

(c) Is the suit one against the United States?

The Statute Involved

The Public Contracts (Walsh-Healey) Act is printed at pp. 3-9 of the Appendix (A-1) filed herewith. In so far as here material, the Act provides, in substance, as follows:

Section 1 (b) provides that in any Government contract for the manufacture or furnishing of supplies in an amount exceeding $10,000, there shall be included a stipulation that all persons employed by the contractor in performing the contract will be paid "not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed"

(a) "on similar work" "or"

(b) "in the particular or similar"

(i) "industries or"

(ii) "groups of industries"

"currently operating"

"in the *locality* in which the * * * supplies * * * are to be manufactured or furnished under said contract * * *."

Section 11 provides that Section 1(b) shall apply only to contracts relating to such industries as have been the subject matter of a determination by the Secretary.

Sections 2 and 3 provide for "liquidated damages" in the amount of any underpayment of wages resulting from breach of a minimum wage stipulation (§ 2); contract cancellation for any such breach (*ibid.*); and black-listing from award of Government contracts for three years of any person found by the Secretary to have committed any such breach (§ 3).

Sections 4 and 5 authorize the Secretary to administer the Act, to make rules and regulations necessary to carry out its provisions, and to make necessary appointments (§ 4); confer power upon the Secretary or his authorized or designated representatives to make investigations and findings as provided in the Act (§ 4) and to hold hearings and to issue orders requiring testimony and evidence under oath relating to the matter under investigation or in question (§ 5); require that the Secretary or such a representative "shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States" (§ 5); and authorize the Secretary or such representative to make such "decisions", based upon findings of fact, as are deemed to be necessary to enforce the provisions of the Act (§ 5).

A copy of the regulations under the Act (No. 504), as in effect at the time of the institution of suit by respondents and at all other times material to this litigation,[7] is set forth in the Appendix (A-2, pp. 11-19) filed herewith.

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[7] Such regulations were amended as of April, 1939, but in no respect having any bearing on the questions here presented.

Summary Statement of Facts[1]

1. The Proceedings Leading Up to the Determination.

Under date of July 11, 1938, petitioner Walling, the Administrator of the Division of Public Contracts, issued notice (R. 45-46) that a hearing would be held before the Public Contracts Board, appointed by the Secretary of Labor, "to take testimony upon which findings of fact will be made to assist the Secretary * * * in determining * * * the prevailing minimum wages in the Iron and Steel Industry". On July 25 and 26, said Board held a "hearing", at which it received unsworn "evidence" and at which respondents were represented (R. 15-16).

On the basis of such "hearing" the Board made Findings of Facts, Conclusions, and Recommendations, dated October 27, 1938, hereinafter called the Report (R. 17). A copy of the Report (R. 47-218) is annexed as an exhibit to the complaint. It consisted of a majority report (R. 47-207) containing the facts found by all members of the Board (R. 207) and the conclusions and recommendations of two of its three members, and a minority opinion (R. 207-218) by the third member stating his conclusions and recommendations.

In the Report, the Board made findings as to the mini-

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[1] This Statement is necessary for the reason that the petition does not contain an adequate statement of the material facts. The petition does not even contain a summary description of any of the so-called "localities" in which the Determination established minimum wages, although the primary issue in the case concerns the authority of the Acting Secretary of Labor to establish minimum wages in areas of such vast extent. Respondents feel justified in suggesting that the failure of the petition to discuss the facts of the case is highly significant.

mum wages (common labor base rates[9]) paid in 234 of the country's 461 iron and steel plants, and the respective locations of such plants (R. 62-74; 77-113). But proceeding on the assumption that the Public Contracts Act did not limit the jurisdiction of the Secretary of Labor to the determination of prevailing minimum wages in "localities", but on the contrary authorized the Secretary to determine prevailing minimum wages in respect of a particular industry "either as a whole or over broad geographical regions" (R. 160),—an interpretation of the Act theretofore followed by the Department of Labor and its Secretary,[10]—the Board *frankly* made no effort to ascertain the minimum

---

[9] This rate is paid to about 8.6% of the workers in the industry (R. 58). It is "substantially a rock-bottom rate" (R. 60) on which wages paid to all other workers are based (R. 60-61). Consequently, all other hourly wages paid will vary with this basic common labor rate (*ibid.*).

[10] See O. R. Strackbein (Member, Public Contracts Board, U. S. Department of Labor) "The Prevailing Minimum Wage Standard" (1939), pp. 30-31: "The Department of Labor interpreted this language [i.e. Sec. 1 (b) of the Act] as providing four alternatives. The standard, thus interpreted, was held to be the prevailing minimum wages for persons employed (1) on similar work; (2) in the particular industry; (3) in similar industries; or (4) in groups of industries currently operating in the locality.

"Under this interpretation, the restrictive clause 'currently operating in the locality' modifies only the fourth alternative, i.e., groups of industries; and the Secretary of Labor is free to disregard the stricture when any one of the other three alternatives is utilized, i.e., similar work; the particular industry, or similar industries."

To the same effect, see *In the Matter of Determination of Prevailing Minimum Wages in the Men's Work Clothing Industry*, 2 Fed. Reg. 233.

wages for iron and steel workers prevailing in the various localities from which the Government might be supplied with iron and steel. It did, however, frequently recognize that different minimum wages prevailed in numerous "producing centers" and "localities" (see, e.g., R. 176-179, 190-192).

The majority recommended (R. 206-207) that the Secretary determine a prevailing minimum wage of 45c. an hour "within the area made up of" the 12 Southern States, running from Virginia to Texas and Oklahoma, and 62½c. an hour "within the area made up of" the remaining 36 States. The minority differed from the majority in recommending that such 36 states should be divided into four sections and that specified prevailing minimum wages be determined in each (R. 216-218), including "the eastern section" (R. 216),—the "region lying east of what is generally known as the Pittsburgh district" (R. 209),—in which a minimum wage of 56½c. per hour was said to prevail (R. 209-216).

2. The Determination.

The matter subsequently came on for oral argument before the Acting Secretary,[11] who handed down the Determination (also annexed to the complaint—R. 239-254) under date of January 16, 1939.

In the argument before the Acting Secretary there was no dispute (and there is none now) regarding the Board's "finding[s] as to the wages actually being paid in the

[11] Respondents had theretofore filed a petition to reopen the hearing before the Board (R. 20-21; 218-230). Such petition having been denied (R. 21), they filed exceptions to the Report (R. 21; 231-239) and a brief in support thereof (R. 22) and participated in such oral argument (R. 22).

industry" (R. 241), which were accordingly adopted by the Acting Secretary (*ibid.*, R. 314), but only as to the "conclusions" and "recommendation[s] based on these wage facts" (R. 241). All objections thereto turned "upon the construction to be placed upon the language of Section 1 (b) of the Public Contracts Act" (R. 242),—a question of law the decision of which underlay the entire Determination.

Apparently conceiving that it was hopeless further to deny that the authority of the Secretary of Labor under the Act is limited to the determination of prevailing minimum wages in "localities",—as is now conceded by petitioners,—the Acting Secretary in the Determination rendered lip service to the statute by purporting to construe the term "locality", as employed in Section 1(b) (R. 242-246), and then to select geographical "areas" (R. 247-250) comprehended within his unique definition of "locality" and to determine prevailing minimum wages therein.

The Acting Secretary "construed" the term "locality" to mean any area, however large, which the Secretary of Labor may select, in the light of "economic facts" pertaining to the particular industry, for the purpose of determining prevailing minimum wages (R. 26, 244-247).[12] This "construction" was disingenuously stated (R. 245) to be the "consistent administrative construction" of the Act. This myth having been exploded by the decision of the court below (R. 393-394), it is now explained (Petition, p. 17, Note 5) that what the Acting Secretary meant was that the result obtained by such "construction" was "wholly consistent" with the "results" obtained by the

[12] The definition of "locality" suggested in the petition for certiorari (p. 15) is "an area of small or large extent according to the economic facts of the particular industry."

earlier "construction", which had entirely *read out* of the Act the requirement that the Secretary determine prevailing minimum wages in particular industries by "localities", and had led to determinations of such wages for the nation as a whole[13] or over broad geographical regions.[14]

The "consistent result" obtained in this case was as follows:

The Determination divided the entire United States into six areas, designated as "localities" (R. 253-254). It stated that "in the *locality* consisting of Ohio, Pennsylvania, Delaware, Maryland, Kentucky, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, and Maine, and that portion of the State of West Virginia comprised within the counties of Hancock, Brooke, Ohio, Marshall, Harrison,[15] and Monongalia, and the District of Columbia," the prevailing minimum wage was determined to be, and was "established" at, 62½c. per hour (R. 254). This area, consisting of 13 states, part of a fourteenth[15] and the District of Columbia, is hereinafter sometimes called the Thirteen State Area. The

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[13] See e.g. the minimum wage determinations for the Men's Work Clothing Industry, 2 Fed. Reg. 233; the Cotton Garment and Allied Industries, 2 Fed. Reg. 1333; and the Work Glove Industry, 2 Fed. Reg. 1339.

[14] See e.g. the minimum wage determinations for the Men's Underwear Industry, 2 Fed. Reg. 1337; and the Luggage and Saddlery Industries, Fed. Reg. (Daily) July 15, 1938, p. 1733.

[15] Not the least startling "result" of the Acting Secretary's "flexible" and "reasonably broad interpretation" (Pet., pp. 16, 17) of "locality" was that the county of Harrison, West Virginia, although *entirely surrounded* by the southern "locality" designated by him, was nevertheless "determined" to be a part of the "northern locality" in which respondents' plants are situated! (See Appendix B.)

eastern portion of such area had been frankly characterized in the Report as a "region" (R. 209).

In the other five so-called "localities" selected in the Determination, viz.:

(1) The "southern area", consisting of 12 states and 49 counties of West Virginia (R. 247), which area, prior to the addition of the West Virginia counties, had been viewed by the Board as a "region" covering "a very large territory" (R. 159),

(2) The 3 west "coastal states" (R. 248),

(3) The 8 "mountain states" (R. 248),

(4) The 7 "remaining states east of the mountain states and west of the Mississippi," and the area about East St. Louis, Illinois (R. 248, 253), and,

(5) The 4 states in the "area immediately to the east of the trans-Mississippi locality", (R. 249),

the hourly prevailing minimum wages were determined to be, and were "established" at, 45c., 60c., 60c., 58½c. and 62½c., respectively (R. 253-254).

Thus the upshot of the Determination was that four minimum-wage areas were fixed, the 62½c. area running from the Atlantic Ocean to the Mississippi and from Maine to Kentucky.

For the convenience of the Court there are set forth in Appendixes B, C and D, respectively, filed herewith:

(a) A map of the United States showing the six areas designated as "localities" in the Determination, and the prevailing minimum wages "established" in each (Appendix B);

(b) A copy of a map contained in the February, 1939, issue of the Labor Information Bulletin, published by the Department of Labor, which shows the

areas in which the four wage rates established by the Determination were "set" (Appendix C); and

(c) A map of the United States depicting (i) the approximate location of the plants in the iron and steel industry concerning which wage data are set forth (R. 63-74) in the Report of the Board; (ii) the common labor base rate paid by each such plant, and (iii) a classification of such plants by the number of wage earners employed thereat (Appendix D).

The Determination was to have become effective by its terms, as modified by a subsequent order of the Acting Secretary (R. 254) amending in this respect his previous "decision",[16] on March 1, 1939.

3. The Purpose and Effect of the Determination.

The purpose and effect of the Determination were to *fix* minimum wages *never theretofore prevailing* in various localities producing iron and steel products. Such was clearly the case in respect of the localities in which respondents' plants are located, and, space permitting, the same could be shown for many other localities (see e.g. R. 137, 138, 140, 148, 151, 165, 176, 178-180).

Respondents operate iron and steel plants in Coatesville,[17] Ivy Rock, Conshohocken, Swedeland,[18] Chester[19]

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[16] Compare Section 5 of the Act.

[17] Approximately 40 miles from Philadelphia and 310 miles from Pittsburgh.

[18] Ivy Rock, Conshohocken and Swedeland are located approximately 15 miles from Philadelphia and 340 miles from Pittsburgh.

[19] Chester is located approximately 15 miles southwest of Philadelphia and 330 miles from Pittsburgh.

and Harrisburg,[20] Pennsylvania; Colgate, Maryland[21]; and Branford, Connecticut[22] (R. 3-8),—all within the Thirteen State Area. The minimum wages (common labor base rates) paid by them vary, depending on the particular respondent and the particular locality in which its plant is situated, from 56½c. per hour to 52½c. per hour (R. 3-8, 313). In four instances such minimum wages (of 53c. and 56½c. per hour) are paid pursuant to collective bargaining agreements with national labor unions (R. 4-6, 8).

It is undisputed that the 62½c. minimum wage established for the Thirteen State Area is not the prevailing minimum wage for iron and steel workers in, or in the vicinity of, any city, county, or other State civil subdivision in which any of respondents' plants is located, or in any small geographical area surrounding any such plant, city, county, or other civil subdivision (R. 314, 255, 63-77; see Appendix D).

The Acting Secretary sought to fix such wage in such localities by the simple device of:

(a) including them in a larger region also embracing Pittsburgh, Youngstown, and other localities to the west enjoying various geographical advantages, in which the prevailing minimum wages for iron and steel workers have for many years been higher than those in the localities in which respondents' plants are situated, and

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[20] Harrisburg is located approximately 100 miles from Philadelphia and 250 miles from Pittsburgh.

[21] Colgate, Maryland, is located approximately 340 miles from Pittsburgh.

[22] Branford, Connecticut, is located approximately 520 miles from Pittsburgh.

(b) labelling such large region a "locality" (R. 29-30, 37-38, 314-316).

But the purpose and effect of the Determination were more sweeping. A glance at Appendix D will reveal that by the same process the Acting Secretary sought to fix a minimum wage never theretofore prevailing in one of the great industrial and geographical regions of the nation.

Thus, although a minimum wage rate lower than 62½c. per hour is paid by all but three plants (operated by one company and employing 115 common laborers) out of a total of 58 plants (employing 5,389 common laborers) located in what is known in the industry as the "Eastern District",[23]—being the entire area of the United States east of Altoona, Pennsylvania, and north of Virginia, plus that portion of Maryland west of the Altoona line and certain counties of West Virginia (R. 255; see Appendix D)[24],—the Acting Secretary nevertheless established a

[23] This was a code district for minimum wage *fixing* purposes under the N. I. R. A. Code of Fair Competition for the Iron and Steel Industry (R. 190).

[24] The common labor base rate wage statistics for the plants in the Eastern District, as found by the Board (R. 63-74; See also R. 255) may be summarized as follows:

	No. of Plants	*No. of Wage Earners*	*No. of Common Laborers*
EASTERN DISTRICT-BASE RATES, COMMON LABOR			
Under 56½¢	30	7,660	1,203
Exactly 56½¢	18	38,069	3,854
Exactly 57¢	5	4,005	194
Over 57¢ but under 62½¢	2	5,195	23
Exactly 62½¢	3	3,602	115
Over 62½¢	—	—	—
	58	58,531	5,389

62½c. minimum wage therein. And he did so, notwithstanding the fact that the Bureau of Labor Statistics of his own Department had for many years recognized[25] that such "Eastern District" was an area between which and the so-called "Pittsburgh district" to the west[26] (grouped with it in the Determination) there had long existed a geographic wage differential in the iron and steel industry.[27]

This "consistent result" was sought to be justified solely on the ground that it "would seem" that a single eastern market area was predominantly served by the iron and steel plants in the Thirteen State Area (R. 250, 315),—a justification which would convert the Act into one authorizing the fixing of equal wages for persons employed

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[25] See, among other publications of the Bureau, Bulletin No. 151, May, 1914; Bulletin No. 353, April, 1924; Bulletin No. 567, December, 1932; Serial No. R. 380; Serial No. R. 415; Serial No. R. 430; and Serial No. R. 446.

[26] The most recent description of such districts is contained in Serial No. R. 380 (reprint from Monthly Labor Review for April, 1936), p. 3.

[27] The following compilation of the average hourly earnings (in cents per hour) of common labor in specified departments of the iron and steel industry is taken from United States Bureau of Labor Statistics Bulletins (No. 513, Table 4, No. 567, Table 6, and No. 403, Table 3):

Year	*Eastern*	*Pittsburgh*	*Year*	*Eastern*	*Pittsburgh*
1907	13.4	15.4	1919	39.8	48.0
1908	12.0	15.6	1920	45.1	53.0
1909	12.3	15.2	1922	32.2	36.0
1910	14.2	16.4	1924	38.6	45.1
1911	14.1	16.6	1926	37.4	45.2
1912	14.4	16.7	1929	37.5	45.3
1913	15.7	19.0	1931	35.1	45.9
1914	15.6	19.0	1933	29.1	35.8
1915	15.5	19.0	1935	41.4	46.6
1917	27.8	30.1			

by manufacturers (wherever located) who market their products in the same area (R. 315).

No findings of "economic facts" were made with respect to, nor was consideration given to, proximity to source of supply, freight rate differentials, caliber of labor, living costs, or any of the other factors affecting wage rates, cost of production or ability to continue to market after the Determination, of the various plants in the various communities (or, indeed, regions[28]) in the great Thirteen State Area. On the contrary, the Labor Department sought no evidence on any of these points (R. 214).

The Determination was, therefore, devoid of even a plausible economic justification for the Acting Secretary's excursion beyond his lawful authority.

4. The Institution of Suit.

Prior to the institution of suit respondents requested a further postponement of the effective date of the Determination, but by February 25, 1939 (the date of suit), petitioners Perkins and McLaughlin had not granted the request, and were threatening to make the Determination effective on March 1, 1939 (R. 25). Together with petitioner Walling, they were threatening to require that there be

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[28] The closest approach to such a finding were the statements of the minority of the Board (R. 214-215) that the Board did not have before it any evidence that the wage rates paid by plants in the Eastern District conferred any competitive advantage in bidding on Government contracts; and that "the forcible merging of the eastern with the western section [of the Thirteen State Area] would introduce a reallocation * * * with the effect that an unearned and gratuitous advantage would be given to one area at the expense of the other."

included in every subject[29] Government iron or steel contract entered into after that date, a stipulation requiring payment of the minimum wages prescribed in the Determination (R. 32). Petitioner Perkins had also adopted regulations requiring that every invitation to bid on any such contract (and, consequently, every bid thereon) should contain a stipulation binding the bidder to comply with the Determination (Reg. 504, Arts. 1, 1101, Appendix A-2, pp. 11, 18).

Petitioner Peoples, Director of Procurement (R. 10), acting pursuant to the direction of petitioners Perkins, McLaughlin and Walling, had directed and threatened to continue to direct every agency of the United States to include such a stipulation in every such contract and the invitations to bid thereon (R. 32, 34).

The other petitioners, chief contracting officers, and their subordinates, had signified their intent to carry out all such regulations and directions (R. 35). Invitations to bid on Navy contracts already published, and on which respondents desired to bid, contained requirements for such stipulations (R. 33-34, 316).

Accordingly, respondents, who, with one exception,[30] had been selling iron and steel products to Government agencies for many years (R. 4-8, 313), filed their complaint (R. 2-45; Exhibits, R. 45-257) on February 25, 1939. Amendments to the complaint, subsequently filed by leave of court (R. 306), are set forth at R. 313-318.

The complaint sought judgment (R. 42-44) enjoining petitioners from enforcing the Determination as aforesaid, ordering petitioners Perkins, Walling and McLaughlin to set aside and withdraw the Determination, and declaring the Determination to be unauthorized by law and invalid.

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[29] That is, every contract of a value in excess of $10,000.

[30] The Atlantic Wire Company.

5. The Gravamen of the Complaint.

The gravamen of the complaint was that respondents' lawful right to bid and negotiate for Government contracts free of limitations or conditions other than those imposed or authorized by Congress was unlawfully invaded and interfered with and threatened with further unlawful invasion and interference by the illegal action taken and threatened by petitioners as aforesaid (R. 36).

The value and importance to respondents of that right appears from the detailed allegations of the complaint showing their long-continued, substantial and generally profitable business relations with the Government (R. 4-8).[31]

Petitioners' illegal interference with that right was of the most serious nature. Complete destruction of the business relations between respondents and their customer was threatened. The complaint shows that if respondents were required to bid on the basis of compliance with the illegal wage conditions prescribed in the Determination, which would raise respondents' wages between 10% and 19%,[32] they were in grave danger of being driven out of competition for Government contracts by large fully integrated

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[31] The Labor Department Bulletins referred to in Note 6, p. 5, *supra*, show that, of the contracts referred to therein, more than $1,600,000, aggregate amount, have been awarded to respondents since March 27, 1939.

[32] In this connection, it is to be borne in mind that, as stated in the complaint (R. 37), and as recognized in the Report (R. 60-61), an increase in the minimum wages paid by respondents to common laborers employed in the performance of Government contracts would necessitate a corresponding increase for all classes of wage earners employed therein, since rates of pay for such other wage earners are ascertained by adding various differentials to common labor base rates.

companies enjoying more favorable geographic locations[23] (in the West and South) whose wage rates were not increased by the Determination (R. 37-38; 171-173; 162).

The impact of such unlawful interference was immediate. The complaint specifically describes certain proposed contracts, covered by the Determination, and generally describes others, some to be awarded within two weeks, others within the near future, by Federal agencies (including those headed by the contracting officers who are petitioners herein), and on which respondents desired to bid, and would bid, if the Determination should not become effective, at prices deemed high enough to enable them to realize profits (R. 33-34, 316-317).

To protect against such illegal invasion of their rights respondents resorted to the only remedy which was plain, adequate or complete (R. 37; opinion below, R. 403-404).

6. The Decisions of the Courts Below.

The judgment of the District Court (R. 319-320), rendered without opinion March 14, 1939, dismissed the complaint, dissolved a temporary restraining order theretofore issued, and refused to rule on and grant respondents' motion for preliminary injunction (R. 259-262).

On March 17, 1939, respondents lodged their record on appeal and, pending printing, filed in the Court of Appeals an original petition for injunction pending appeal (R. 337-355). After argument on March 22, 1939, before its entire membership (R. 371-372), that court on March 27, 1939, issued its order (R. 372) enjoining the petitioners herein, "until the further order of the Court, from continuing in effect the Determination".

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[23] From the standpoint of proximity to raw materials, proximity to markets and freight rate differentials (R. 38).

The appeal proper[34] was argued on April 4, 1939, before Justices Miller, Vinson and Edgerton (R. 385-386). On August 4, 1939, in a *per curiam* order and opinion in the appellate proceeding (R. 387-388), the court continued in effect the injunction previously granted,[35] announced the decision of its majority that the complaint stated a cause of action for an injunction as prayed, and stated that, upon filing of majority and minority opinions, the appropriate judgment would be entered.

On October 3, 1939, the opinions (R. 388-410) were filed, and judgment (R. 410) was entered reversing the judgment of the District Court and remanding the case with instructions to proceed in accordance with the opinion of the Court of Appeals.

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[34] Together with petitioners' motion to reargue the granting of the preliminary injunction or to clarify the injunction granted (R. 373-378).

[35] Such injunction is still in effect, and the order continuing it, of course, disposed of petitioners' motion referred to in Note 34. Cf. Petition, p. 8.

ARGUMENT

I

The Decision Below Holding the Determination Invalid Because Beyond the Authority of the Secretary of Labor Plainly Conforms with Both the Letter and Spirit of the Statute Involved.

The authority conferred by the Act upon the Secretary of Labor is to determine "the prevailing minimum wages for persons employed[1] * * * in the *locality* in which" specified government supplies "are to be manufactured or furnished under * * * contract * * *." The Secretary has no jurisdiction to determine minimum wages prevailing on the continent of North America, or in the United States, or in "regions" or other "broad geographical areas" thereof. She must determine such wages only in "localities." Her jurisdiction is, therefore, bounded by the meaning of the word "locality."[2]

The court below has held that that term, as employed in the statute, means a "*local center* of manufacture" or "community" (R. 392, 395, 390),— on the ground that such meaning is compelled by common usage and the context and is confirmed by the legislative history of the Act and the statements of its sponsors that its purpose was to authorize the Secretary to ascertain prevailing minimum

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[1] On "similar work", or "in the particular or similar industries or groups of industries currently operating".

[2] This is a question of law for the courts. *Work* v. *Louisiana*, 269 U. S. 250, 253-254, 260; *Santa Fe Pac. R. Co.* v. *Payne*, 259 U. S. 197, 199; *Payne* v. *Central Pac. Ry. Co.*, 255 U. S. 228; *Waite* v. *Macy*, 246 U. S. 606; *Gegiow* v. *Uhl*, 239 U. S. 3; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; see *Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329, 335.

wages in "communities", but not to fix wages (R. 395). Accordingly, the court held that the Determination, which sought to establish a single minimum wage in the Thirteen State Area, was palpably beyond the Secretary's authority.[3]

Petitioners argue (Pet., p. 15) that the court should have held that a "locality" is "an area of small or large extent according to the economic facts of the particular industry" and which may embrace at least 13 states.

(a) We believe that no extensive argument is necessary to persuade this Court that the well settled connotation of "locality" is "community", or "local center", or a similarly described small geographical area,—and not a region including at least 13 states. As pointed out by the court below (R. 393),—to the opinion of which reference is made for many of the more common expressions using the term and its derivatives,—this has been "long and well known to those acquainted with the American tradition". Indeed, petitioners do not dispute that the court below assigned to the term its commonly accepted meaning, but urge that in doing so the court did violence to the legislative intent and purpose.

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[3] The court, of course, recognized (R. 390) that within the proper limits of the meaning of "locality," the Secretary is authorized and required by the statute to exercise judgment and discretion in the selection of the particular territorial unit within which to determine minimum wages. For instance, the Secretary might select a city, a county or some similar subdivision of a State, or a metropolitan area which might even overlap a State line (R. 392)—all fairly embraced within the concept of "locality". It is obvious, however, that the Thirteen State Area does not come within such proper limits; and, indeed, petitioners concede that if the statute was correctly interpreted by the court the Determination is unlawful.

(b) The Walsh-Healey Act, adopted in recognition of the principle that, in the absence of enabling statute, the executive may not require a Government contractor to pay any specified wage to his employees,[4] is one of a series of statutes designed to carry out a general policy that the wages paid on Government work should conform to the currently prevailing wage rates or minimum wage rates for like work in the locality where the work is performed.[5]

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[4] 10 Comp. Gen. Dec. 294. This decision of the Comptroller General has been followed in practice by all the executive departments of the Government, and was expressly confirmed by the Senate Committee in charge of the original Walsh Bill (S. 3055, 74th Cong., 1st Ses.), which, after extensive amendment, became the present Public Contracts Act. In explaining the desirability of a statute authorizing the insertion of a minimum wage stipulation in contracts for Government supplies, the Senate Committee Report (No. 1157, 74th Cong., 1st Ses.) on such bill stated:

> "The committee believes that in the absence of action by Congress the Executive has power to require any condition in contracts, loans, or grants necessary to protect the United States but that his authority stops there and that matters of general policy not strictly necessary to secure to the United States the performance of a contract can only be laid down by Congress."

[5] In addition to the Walsh-Healey Act and the Bacon-Davis Act, as amended (46 Stat. 1494; 49 Stat. 1011), discussed in the text, see the Emergency Relief Appropriation Acts of 1937 (50 Stat. 352, 354, § 2) and 1938 (52 Stat. 809, 812, § 9), providing that the rates of pay for persons employed on projects thereunder should be not less than the prevailing rates of pay for work of a similar nature "in the same locality"; and § 16(2) of the Act of September 1, 1937 (50 Stat. 888, 897), creating the United States Housing Authority, and § 14 of the Act of June 3, 1939 (53 Stat. 807), amending the National Housing Act, each of which provides for the payment of the wages "prevailing in the locality" in which the work is to be performed.

The first such statute was the Bacon-Davis Act,[6] which, as amended in 1935, requires that the wages paid each class of workmen on Government construction contracts shall be based on the prevailing wages, to be determined by the Secretary of Labor, for like work "in the city, town, village, or other civil subdivision of the State in which the work is to be performed". Such territorial units were described by Representative Bacon, co-author of the statute, and by the Secretary of Labor, respectively, as "communities" and "localities".[7]

In 1936 (after first having rejected bills authorizing the fixing, by executive action, of wages to be paid on Government supply contracts[8]) the Congress enacted the Walsh-Healey Act for the purpose of extending to such contracts the principles of the Bacon-Davis Act with regard to pre-

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[6] 46 Stat. 1494; 49 Stat. 1011.

[7] For the statement by Rep. Bacon, see 74 Cong. Rec. 6511. For the description by Secretary Perkins, see "Regulations Prescribed by the Secretary of Labor as to the Procedure to be Followed in Predetermining Prevailing Rates of Wages" under the Bacon-Davis Act (U. S. Dept. Labor, No. 503, September 30, 1935), § 2.

In testifying as to her experience in administering the Bacon-Davis Act before the Judiciary Subcommittee of the House, on H. R. 11554 (the bill introduced by Rep. Healey to authorize fixing of wages on government supply contracts—see Note 8), Secretary Perkins also plainly distinguished between a "locality" (meaning thereby a town) and a "large area" (such as a State). Hearings on H. R. 11554, 74th Cong., 2nd Ses., Serial 12, Part 2, at pp. 230-231.

[8] S. 3055, 74th Cong., 1st Ses.; H. R. 11554, 74th Cong., 2nd Ses. After extensive amendment in committee which, *inter alia*, deleted the wage fixing provisions of both such bills, S. 3055 was passed by both houses as the Public Contracts Act.

vailing minimum wages. That such was the Congressional purpose, that the Congress intended not to confer directly or indirectly any wage-fixing power on the Secretary of Labor, and that Congress likewise intended to limit the Secretary's power to the ascertainment of prevailing minimum wages in "communities", appears irrefutably from the statements of the members of the Rules Committee and of the Judiciary Committee and subcommittee of the House of Representatives sponsoring and in charge of the Act, which are quoted in the opinion of the court below (R. 395, Notes 51-52).

In the light of the foregoing, it is plain that petitioners neither negative the construction of the court below, nor advance the cause of their meaningless "definition", by pointing out (Pet., p. 16) that Congress in the Walsh-Healey Act employed the more flexible[9] term "locality" instead of the language of the Bacon-Davis Act.[10] As pointed out by the court below (R. 392-393), the significance of the choice was merely to avoid confining prevailing minimum wage determinations to arbitrary political boundary lines of civil subdivisions of a State and not to permit

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[9] Throughout the petition, great emphasis is placed on the "flexibility" of the term "locality". But this begs the question. The term, though indefinite within narrow limits, unmistakably connotes restricted geographical limitations. See opinion below, R. 390-391.

[10] It is argued (Pet., p. 16) that the choice of language was dictated by the consideration that construction contracts "necessarily can be performed at only one place", whereas supply contracts may be performed at various places. That such was not the reason for such choice is shown by the fact that Congress has used the "locality" standard interchangeably for supply and construction contracts. See Note 5, p. 25, *supra*.

establishment of minimum wages for an industry throughout the nation or "over broad regional areas."

Equally untenable is petitioners' suggestion (Pet., pp. 14-15) that the construction adopted below would "wholly defeat the obvious policy of the * * * Act * * * to insure that Government contractors pay not less than prevailing minimum wages, and to eliminate substandard wages as a competitive element in bidding". This argument really begs the question by ignoring the requirments of the statute that prevailing minimum wages *in* "localities" be ascertained[11] and by assuming or implying that the function of the Secretary thereunder is to fix equal minimum wages for all who may bid on the same Government contract.

Congress, of course, sought to eliminate from competition for Government supply contracts those who would not agree to pay the prevailing minimum wages in the "localities" in which the work was to be performed, and those who reduced wages to a level below the minimum prevailing in their communities in order to obtain or carry out such contracts. But, as appears on the face of the statute and from the clearly expressed Congressional intent, the prevailing minimum wage practice *in* such "localities"

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[11] Petitioners suggestion (Pet. p. 15) that "the word 'locality' was, no doubt, inserted in order to authorize and direct the Secretary of Labor to take account of geographic differentials in wage scales", does not meet the issue. The requirement of the Act is that the Secretary determine prevailing minimum wage *in* localities, not that such wage scales or any others be "taken account of". In effect, petitioners are attempting by "interpretation" to reach the same result expressly contemplated by S. 3055, the wage-fixing measure rejected by Congress, which in terms authorized the wage-fixing authority to "take into account", *inter alia*, the standards "in the same locality".

(viz., communities) was made the test, *not* the notions of the Secretary of Labor as to what should be a proper minimum wage for those bidding on the same contract.

(c) There is no merit in petitioners' contention (Pet., pp. 14-16) that the decision of the court below would operate to reduce the Act to a "futile gesture" because on occasion but one plant of a particular industry will be found in a local center of manufacture.

This argument completely ignores the fact that the Secretary is authorized by the Act to use three criteria other than prevailing minimum wages in a particular industry in a "locality" viz., such wages paid on "similar work" or in "similar industries" or in "groups of industries". That Congress authorized the Secretary to use such other criteria for the very purpose of making wage determinations by localities feasible under the circumstances suggested was conceded by petitioners in the court below[12] and we are, therefore, surprised that they ignore this consideration here.

(d) It is further urged (Pet., pp. 14-15) that the lower court's construction of the Act would make it difficult of administration by requiring a large amount of preliminary work (regarded by the Department of Labor as useless) in advance of invitations for bids. This is strongly to be doubted,[13] but, as is pointed out by the court below, admin-

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[12] Petitioners' Brief in the court below, p. 88.

[13] Thus, in connection with the Determination, the Public Contracts Board sought wage data from every iron and steel plant in the country (R. 49), and, within a few days and without seriously extending itself, obtained such data from more than one-half such plants (R. 49-50, 77-78, 117). In this regard, it is pertinent to note that Secretary Perkins has testified that there has been "surprisingly little" difficulty in administering the Bacon-Davis Act, even though that act has

istrative inconvenience has, in any event, never been regarded as a "reason for disregarding the clearly expressed intention of Congress" (R. 393).

(e) It is also objected (Pet., pp. 16-17) that the decision of the court below contradicts the contemporaneous administrative construction under which the word "locality" means an area of small or large extent, according to the economic facts of the particular industry. But it is perfectly obvious, from a mere perusal of this so-called administrative construction, that it is no construction at all. It is a mere device resorted to for the purpose of fixing wages either in the entire United States or over "broad geographic regions" under the cloak of an utterly meaningless definition,[14]—a mantle assumed to obtain "results" "consistent" with those theretofore reached under a "construction" which had read the term "locality" out of the statute entirely (see pp. 9, 11-12, *supra*). And, as pointed out by the court below (R. 393-394) this alleged administrative construction became "contemporaneous" two and one-half years after the passage of the Act and exactly forty days prior to the commencement of suit.

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required the determination of prevailing wages for *"every classification"* of work in the hundreds of localities "scattered" throughout the nation in which public buildings and other public works have been constructed. See Hearings on H. R. 11554, 74th Cong., 2nd Sess., Serial 12, Part 2, at pp. 230-231.

[14] The Acting Secretary himself observed in the Determination (R. 246) that, when given his construction, "the language of the statute does not itself suggest answers to the questions which it raises". The serious questions of unconstitutional delegation of legislative authority which would be presented if such construction were adopted are readily apparent.

II

The Decision Below, Holding That Respondents Have a Standing to Sue and May Obtain Judicial Review of the Action Complained of, Was Manifestly Correct.

The primary contention of petitioners (Pet. pp. 9-12) is that, no matter how unlawful their action and threatened action, relief may not be accorded by the courts in this suit, or any other, for the reasons (1) that neither respondents, nor anyone else, has a "legally protected right" which will or could be injured by the action complained of; and (2) that such action is not subject to judicial review.[1]

The court below, in rejecting this contention (R. 397-400), followed the consistent course charted by the decisions of this and other courts.

(a) The right asserted by respondents is, as pointed out in the Statement (p. 20), the right to bid and negotiate for contracts with the United States subject only to the conditions imposed, or authorized to be imposed, by *Congress*, and free from the unlawful interference of third parties, including public officers acting outside the scope of their authority.

(b) Such right is only one phase of the right of every person to conduct a legitimate business,—pursue a legitimate calling,—and in the conduct thereof to seek to sell the products or services of that business, free from unjustifiable interference, restraint, or coercion by others. The law has sedulously protected that right for centuries.[2]

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[1] If such contention were sustained, the courts would, of course, be powerless in the face of a "determination" that the prevailing minimum wages in the iron and steel industry are $10 an hour in a "locality" comprising the entire United States.

[2] Restatement of Torts (1939), § 766.

The Government has been a customer for many years of all respondents save one, and, at the date of institution of suit, was not only a party to contracts with several, but an immediate and active prospective customer of all.[3] Petitioners (who, like all public officers acting beyond their lawful authority, were acting as individuals[4] and, therefore, as third parties *vis-a-vis* respondents and the Government) threatened without justification to destroy respondents' right to negotiate contracts with that customer subject only to conditions imposed or authorized *by it* (i.e. by Congress whose province it is to authorize or impose such conditions).

Accordingly, under the repeated decisions of this and other courts protecting the right to negotiate and deal with customers or prospective customers for goods or services against unlawful or otherwise unjustifiable interference of third parties (including public officers acting beyond their authority),[5] the court below was plainly cor-

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[3] See pp. 19-21, *supra*.

[4] *Osborn* v. *The Bank of United States*, 9 Wheat. 738, 833; *Filor* v. *United States*, 9 Wall. 45, 48-49; *United States* v. *Lee*, 106 U. S. 196, 210; *Poindexter* v. *Greenhow*, 114 U. S. 270, 288; *Ex parte Young*, 209 U. S. 123, 159-160; *Goltra* v. *Weeks*, 271 U. S. 536, 544; *Ex parte La Prade*, 289 U. S. 444. See also the cases collected in Point III.

[5] Among the numerous cases which might be cited are *Pierce* v. *Society of Sisters*, 268 U. S. 510; *Truax* v. *Raich*, 239 U. S. 33; *Terrace* v. *Thompson*, 263 U. S. 197; *Scully* v. *Bird*, 209 U. S. 481, cited with approval in *Tennessee Power Co.* v. *T. V. A.*, 306 U. S. 118, 137-138; *Pratt Food Co.* v. *Bird*, 148 Mich. 631, 112 N. W. 701; *State* v. *District Court*, 17 N. D. 285, 115 N. W. 675; *Crescent Mfg. Co.* v. *Mickle*, 216 Fed. 246 (D. C. Ore.); *Roe* v. *Lundstrom*, 89 Utah 520, 57 Pac. (2d) 1128; *Emack* v. *Kane*, 34 Fed. 46 (Cir. Ct., N. D. Ill.); *Price-*

rect in holding that respondents are entitled to the relief sought. Many of such decisions were rendered in the face of the precise objection advanced by petitioners herein, namely, that the sellers had no judicially cognizable right because they could not have compelled their prospective customers to deal or contract with them.[6]

(c) The right asserted is recognized and affirmed by the Public Contracts Act itself by which Congress has imposed certain conditions on the exercise of the right to bid for and negotiate contracts with the Government. In so doing, Congress has necessarily excluded the imposition of other conditions, within the field occupied by the statute, upon the exercise of that right. No one can read the statute, or examine its legislative history,[7] without reaching the self-evident conclusion that Congress intended that

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Hollister Co. v. *Warford Corporation*, 18 Fed. (2d) 129 (D. C., N. D. Okla.); *American Mercury Co., Inc.* v. *Chase*, 13 Fed. (2d) 224 (D. C., Mass.); *Graham* v. *Street Railroad Co.*, 47 La. Ann. 1656, 18 So. 707; *Sparks* v. *McCreary*, 156 Ala. 382, 47 So. 332; *Loewe* v. *Lawlor*, 208 U. S. 274; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418; *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229; *Duplex Co.* v. *Deering*, 254 U. S. 443; and *Truax* v. *Corrigan*, 257 U. S. 312. Such criticism as has been directed at the decisions in the five cases last cited (and similar decisions involving labor boycotts, etc.) has not been on the ground that the plaintiffs therein did not have any legal rights worthy of protection, but has been based on the theory that the conduct of the defendants therein was justifiable or privileged because of their self-interest. It is elementary that public officers may justify their action only by authority of law. See Note 2, p. 40, *infra*.

[6] See particularly *Truax* v. *Raich*, 239 U. S. 33, 38; *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535-536; and Mr. Justice Holmes, dissenting in *May* v. *Woods*, 172 Mass. 11, 14.

[7] See pp. 25-27, *supra*.

every person who should comply with the conditions laid down by it therein[8] should have the right to bid on Government contracts free from inconsistent conditions imposed by others.

The court below, in so holding (R. 399-400), not only gave effect to the plain intent of Congress, but followed the principles long established by the decisions of this Court.[9]

(d) The right asserted is recognized, and rendered more valuable than the corresponding right to seek the patronage of prospective private customers free of unjustifiable interference by third parties, by Section 3709, R. S.[10]

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[8] And, of course, in any other pertinent statutes not here in question.

[9] *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 111; *Gegiow* v. *Uhl*, 239 U. S. 3, 9: "The statute by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases"; *Waite* v. *Macy*, 246 U. S. 606, 609.

[10] "Except as otherwise provided by law all purchases and contracts for supplies or services in any of the departments of the Government and purchases of Indian supplies, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals." [41 U. S. C. § 5]

which, with exceptions not here material, requires[11] competitive bidding, after public advertisement, on Government supply contracts, and the award of such contracts to the lowest responsible bidders.[12]

Indeed, we believe that Section 3709 itself constitutes a third source of the right asserted by respondents.[13] The Court below, however, did not deem it necessary to rest its decision on that additional ground.

Consequently, even if petitioners were correct in their contention (Pet., p. 11) that Section 3709 confers no legal rights upon bidders for Government contracts, that would disclose no infirmity in the decision below. It is to be noted, however, that the cases relied on by petitioners to establish that proposition do not support it.[14]

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[11] See *Snyder* v. *United States*, 19 Ct. Cl. 547; *Scott* v. *United States*, 44 Ct. Cl. 524; 19 Op. Att. Gen. 685; 28 Op. Att. Gen. 384; 38 Op. Att. Gen. 555, 557.

[12] The requirements thus imposed by Congress, for the purpose of enabling the Government to purchase its supplies at the lowest price, would be meaningless, unless predicated on the assumption that all persons complying with the conditions imposed or authorized by Congress may bid on public contracts free of further conditions unlawfully imposed. See Note 4, page 25, *supra*.

[13] This Court has expressly stated that Section 3709 "necessarily" gives "rights" to bidders, including "the chance for a bargain". *United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 318.

[14] *American Smelting Co.* v. *United States*, 259 U. S. 75, and *O'Brien* v. *Carney*, 6 Fed. Supp. 761 (D. C. Mass.) are discussed in the text. The other cases cited did not involve R. S., § 3709. *United States* v. *New York & Porto Rico S. S. Co.*, 239 U. S. 88, held that a government contractor could

Of the two cases cited which involved Section 3709, the decision of this Court [15] contains a dictum that a government contractor may not disaffirm an executed contract on the ground that it has not been advertised, and the decision of the Massachusetts District Court[16] refused to enjoin the performance of a contract theretofore awarded, and to mandamus its re-award, at the instance of a low bidder who claimed that he was responsible. The latter decision does not stand for the proposition that, in a case not involving the exercise of discretion by a contracting officer as to a bidder's responsibility, or as to the advisability of rejecting all bids, or otherwise, Section 3709 does not confer on a lowest responsible bidder the right to a contract.[17]

But, however that may be, respondents do not assert any

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not defend against a suit for breach of contract on the ground that the contract was not in writing and signed as provided in R. S., § 3744. *Colorado Paving Co.* v. *Murphy*, 78 Fed. 28 (C. C. A. 8th), and *United States Wood Preserving Co.* v. *Sundmaker*, 186 Fed. 678 (C. C. A. 6th), involved, respectively, a city charter and a state statute, differing from § 3709, and held that a bidder, who alleged his responsibility and that his low bid should not have been rejected because his product was inferior or did not conform with contract specifications, could not enjoin the award of a contract to another and compel award to himself.

[15] *American Smelting Co.* v. *United States*, *supra*, Note 14.

[16] *O'Brien* v. *Carney*, *supra*, Note 14.

[17] This question is expressly left open in *Noce* v. *Edward E. Morgan Co.*, 106 Fed. (2) 746 (C. C. A. 8th), by the court which decided *Colorado Paving Co.* v. *Murphy*, *supra*, Note 14. For cases holding that similar state laws confer such right in the circumstances suggested, see *Arensmeyer-Warnock-Zarndt* v. *Wray*, 118 Misc. 619, 194 N. Y. Supp. 398; *State ex rel. Journal Printing Co.* v. *Dreyer*, 183 Mo. App. 463, 167 S. W. 1123; *Berry* v. *City of Tacoma*, 12 Wash. 3, 40 Pac. 414.

such right. Section 3709 certainly confers other rights on bidders or affirms such rights.[18] And whether or not it constitutes an additional source of the right asserted herein is, in any event, immaterial.

(e) Indeed, petitioners concede that respondents have a legal right to do business with the Government upon such terms and conditions as *it* may prescribe. They state (Pet., p. 11): "That no person has a legal right to do business with the Government *except* upon such terms and conditions as the *Government* may prescribe would seem no longer open to argument." They apparently assume, however, that they are the "Government".

But in that assumption they are, of course, mistaken. They represent the Government only to the extent that they act within the scope of their lawful authority. When, as in this case, they exceed their authority, they act only as individuals.[19] Their entire argument collapses as a result of this failure to distinguish between the authority of the Government (respondents' customer), acting through *Congress*, to impose (like any other customer) such conditions as it sees fit upon doing business with it,[20] and the lack of authority of petitioners, third parties, to impose additional conditions not authorized by law, which interfere with petitioners in their efforts to do business with their customer.

(f) Petitioners' contention (Pet., p. 11-12) that respondents are without standing to sue because they complain only of "governmental action which merely increases or sharpens competition" is also untenable. Respondents do

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[18] *United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 318, *supra*, Note 13.

[19] See Note 4, *supra*, p. 32, and cases collected in Point III.

[20] *Ellis* v. *United States*, 206 U. S. 246; *Heim* v. *McCall*, 239 U. S. 175.

not complain of governmental action which *merely* increases or sharpens competition. They complain of unlawful individual action, taken under pretense of authority, which invades their legal rights; and show impairment of competitive position as an element of irreparable damage.

(g) Both the majority and the minority of the court below rejected petitioners' contention,—now advanced with some diffidence (Pet., p. 12),—that their action, taken and threatened, is not subject to judicial review. This contention is based on the theory that the Determination was not an order commanding respondents to act, or subjecting them to any liability, or withholding any license. Whether or not that is true is immaterial.

The Determination itself purported finally to bind respondents; and, under the provisions of the Act and the regulations directing other administrative officials to act in accordance with the Determination, its immediate legal effect, in the absence of judicial restraint, would have been finally to bind respondents and unlawfully to abridge their right to bid on Government contracts immediately to be let.[21] Moreover, the Secretary's regulations and the other acts and threats of petitioners referred to in the Statement (pp. 18-19) all constituted further steps in the enforcement of the Determination against respondents, illegally invading or threatening to invade such right to their immediate and irreparable injury.

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[21] The determination was not, therefore, a mere "stage in an incomplete process of administrative adjudication", having "no immediate legal effect" and "abridging" no right, as in *United States* v. *Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, relied on by petitioners, and distinguished on these grounds in *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 129-131, 143. See also cases cited in Notes 23 and 24, *infra*.

Mere reference to these considerations demonstrates the correctness of the ruling below. The decisions of this Court firmly establish that, in the absence of specific statutory provision to the contrary,[22] a person whose rights have been invaded or are threatened with invasion by the action of administrative officers beyond their statutory authority (even with respect to matters which Congress may commit to exclusive executive determination [23]) is entitled to judicial review of such action by bill in equity.[24]

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[22] Section 5 of the Act seems expressly to contemplate judicial review of wage determinations, whether viewed as "findings" or "decisions",—particularly in view of the fact that the author of the Act stated that the Secretary was authorized to make a wage determination only after hearing. 80 Cong. Rec. 10002, 10023.

[23] *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 110; *Gegiow* v. *Uhl*, 239 U. S. 3, 9; *Waite* v. *Macy*, 246 U. S. 606, 608-609; *Work* v. *Louisiana*, 269 U. S. 250, 253-254, 260; see Brandeis, J., dissenting in *Crowell* v. *Benson*, 285 U. S. 22, 89-91; *Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329, 335.

[24] *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 621-622; *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 182-183; *Utah Fuel Co.* v. *Coal Commission*, 306 U. S. 56, 59-60.

III

The Decision of the Court Below That the Suit Is Not One Against the United States Is Not Open to Question.

The decision below in no way conflicts with the rule that the United States may not be sued, without its consent, either directly or in an action nominally against a public officer, but in which the decree sought would have the effect of one entered in a suit brought directly against it.

The principle has long been established[1] that a suit against a public officer is not one against the sovereign, where, as here, the gravamen is invasion or threatened invasion of the legal rights of the complainant by affirmative action in excess of the officer's authority and the real object is an injunction restraining or undoing such action.

The reason is clear. The acts of public officials must be justified by authority conferred by law.[2] When, therefore, an official takes or threatens affirmative action in excess of

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[1] *Osborn* v. *The Bank of United States*, 9 Wheat. 738; *Davis* v. *Gray*, 83 U. S. 203; *Pennoyer* v. *McConnaughy*, 140 U. S. 1; In re *Tyler*, 149 U. S. 164; *Scranton* v. *Wheeler*, 179 U. S. 141; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Ex parte Young*, 209 U. S. 123; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; *Waite* v. *Macy*, 246 U. S. 606; *Colorado* v. *Toll*, 268 U. S. 228; *Ickes* v. *Fox*, 300 U. S. 82.

[2] "The acts of all of its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 108. "A defendant sued as a wrong-doer, who seeks to substitute the state in his place, or to justify by the authority of the state, or to defend on the ground that the state has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. * * * It is necessary, therefore, for such a defendant, in order to complete his de-

his authority which invades or will invade the legal right of another, his act is personal in nature and derives no official justification from being done in asserted agency for the United States.[3] Consequently, a decree in a suit brought to defend against such invasion, actual or threatened, and which merely enjoins, or compels the official to undo, such personal action, does not affect the United States.

Many, if not most, of the occasions for the application of these principles have arisen in cases involving action by public officials who asserted that they were carrying on the "ordinary" or "vital" functions of government in fields not generally considered to be "regulatory" in character (Pet., p. 13). Illustrative of suits held not to be against the United States (or a State) are suits to enjoin the Secretary of the Interior from requiring a land claimant to comply with an allegedly unauthorized condition prior to consideration of a claim to public lands;[4] to dispossess military officers occupying, for army purposes and under claim of title in the United States, property alleged to belong to the plaintiff;[5] to prevent the allegedly unauthorized fixing by a Federal officer of charges of railroads in the possession and control of, and whose revenues belonged to, the United States under the war power;[6] to

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fense, to produce a law of the state which constitutes his commission as its agent, and a warrant for his act." *Poindexter* v. *Greenhow*, 114 U. S. 270, 288. See *Marbury* v. *Madison*, 1 Cranch 137, 170.

[3] *Goltra* v. *Weeks*, 271 U. S. 536, 544.

[4] *Work* v. *Louisiana*, 269 U. S. 250. See also *Santa Fe Pac. R. Co.* v. *Lane*, 244 U. S. 492.

[5] *United States* v. *Lee*, 106 U. S. 196. See also *Tindal* v. *Wesley*, 167 U. S. 204.

[6] *No. Pac. Ry. Co.* v. *North Dakota*, 250 U. S. 135. See also *Dakota Cent. Telephone Co.* v. *South Dakota*, 250 U. S. 163.

enjoin repossession of boats in alleged violation of a lease thereof by the United States;[7] and to enjoin a levy upon property or to restore property taken, to satisfy a state tax in alleged impairment of contract.[8]

Petitioners cite *Louisiana* v. *McAdoo*, 234 U. S. 627, and *Goldberg* v. *Daniels*, 231 U. S. 218, but these cases do not conflict with the principle or decisions upon which respondents rely. In neither case was the complainant seeking to restrain or undo affirmative action taken by the defendant in excess of his authority which invaded or threatened to invade the complainant's legal rights. On the contrary, complainant sought in each case to compel the defendant to exercise his official discretion, and, in the case last cited, sought in the process to obtain property owned by and in the possession of the United States.

Wells v. *Roper*, 246 U. S. 335; *Transcontinental & Western Air, Inc.* v. *Farley*, 71 Fed. (2d) 288, and *Johnstown Coal & Coke Co.* v. *Wilson*, 60 Fed. (2d) 557, also relied on by petitioners, involved attempts to restrain or control the acts of administrative officials within the scope of their authority.[9]

Petitioners contend, however, on the authority of these cases, that a suit for an injunction which would have the effect of specifically enforcing a contract of the United States is a suit against the United States, and that consequently the instant suit is likewise one against the United States. But this is a complete nonsequitur. Respondents are not seeking to compel the United States to do anything,

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[7] *Goltra* v. *Weeks*, 271 U. S. 536.

[8] *Allen* v. *B. & O. R. Co.*, 114 U. S. 311. See also *Poindexter* v. *Greenhow*, 114 U. S. 270.

[9] See opinion below, R. 396, Notes 61 and 64.

directly or indirectly. They are merely trying to prevent individuals from taking, under color of office, action which Congress has not authorized, and which, indeed, is contrary to the statutes of the United States.

The petitioners virtually repeat this argument in their broad contention (Pet., pp. 13-14) that the relief sought by respondents constitutes interference with the contracting and purchasing activities of the United States. This argument stands on the same legal footing as that last rejected. And from a practical standpoint it is repudiated by the recorded experience (pp. 4-5, *supra*) of government contracting agencies since the granting of the temporary relief sought in the complaint.

Respectfully submitted,

WILLIAM CLARKE MASON,
O. MAX GARDNER,
FREDERICK H. KNIGHT,
HAROLD F. MCGUIRE,
ROBERTS B. THOMAS,
Counsel for Respondents.

January, 1940.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 593.

FRANCES PERKINS, Individually and as Secretary of Labor of the United States, et al., *Petitioners*,

v.

LUKENS STEEL COMPANY, a corporation, et al., *Respondents*.

APPENDIX

to

RESPONDENTS' BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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APPENDIX C—Copy of a map contained in the February, 1939, issue of the Labor Information Bulletin of the Department of Labor, which shows the areas in which the four wage rates established by the Determination were "set."

APPENDIX D—Map of the United States depicting (1) the location of plants in the Iron and Steel Industry concerning which wage data are set forth in the Report of the Public Contracts Board, dated October 27, 1938, upon which the Determination was based, (2) the common labor base rate (the minimum wage) paid at each such plant, and (3) a classification of such plants by the number of wage earners employed thereat.

APPENDIX A1

[PUBLIC—No. 846—74TH CONGRESS]
[S. 3055]

AN ACT

To provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:

(a) That the contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract;

(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;

(c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the con-

tract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week;

(d) That no male person under sixteen years of age and no female person under eighteen years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract; and

(e) That no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this subsection.

SEC. 2. That any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 1 hereof shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, the sum of $10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; and, in addition, the agency of the United States entering into such contract shall have the right to cancel same and to make open-market purchases or enter

into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in section 1 hereof may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: *Provided,* That no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America.

SEC. 3. The Comptroller General is authorized and directed to distribute a list to all agencies of the United States containing the names of persons or firms found by the Secretary of Labor to have breached any of the agreements or representations required by this Act. Unless the Secretary of Labor otherwise recommends no contracts shall be awarded to such persons or firms or to any firm, corporation, partnership, or association in which such persons or firms have a controlling interest until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred.

SEC. 4. The Secretary of Labor is hereby authorized and directed to administer the provisions of this Act and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary to assist in the ad-

ministration of this Act and to prescribe rules and regulations with respect thereto. The Secretary shall appoint, without regard to the provisions of the civil-service laws but subject to the Classification Act of 1923, an administrative officer, and such attorneys and experts, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as he may from time to time find necessary for the administration of this Act. The Secretary of Labor or his authorized representatives shall have power to make investigations and findings as herein provided, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act.

SEC. 5. Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of this Act, and on complaint of a breach or violation of any representation or stipulation as herein provided, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, failure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the applica-

tion by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act.

SEC. 6. Upon a written finding by the head of the contracting agency or department that the inclusion in the proposal or contract of the representations or stipulations set forth in section 1 will seriously impair the conduct of Government business, the Secretary of Labor shall make exceptions in specific cases or otherwise when justice or public interest will be served thereby. Upon the joint recommendation of the contracting agency and the contractor, the Secretary of Labor may modify the terms of an existing contract respecting minimum rates of pay and maximum hours of labor as he may find necessary and proper in the public interest or to prevent injustice and undue hardship. The Secretary of Labor may provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act respecting minimum rates of pay and maximum hours of labor or the extent of the application of this Act to contractors, as hereinbefore described. Whenever the Sec-

retary of Labor shall permit an increase in the maximum hours of labor stipulated in the contract, he shall set a rate of pay for any overtime, which rate shall be not less than one and one-half times the basic hourly rate received by any employee affected.

SEC. 7. Whenever used in this Act, the word "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

SEC. 8. The provisions of this Act shall not be construed to modify or amend title III of the Act entitled "An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes", approved May 3, 1933 (commonly known as the Buy American Act), nor shall the provisions of this Act be construed to modify or amend the Act entitled "An Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes", approved March 3, 1931 (commonly known as the Bacon-Davis Act), as amended from time to time, nor the labor provisions of title II of the National Industrial Recovery Act, approved June 16, 1933, as extended, or of section 7 of the Emergency Relief Appropriation Act, approved April 8, 1935; nor shall the provisions of this Act be construed to modify or amend the Act entitled "An Act to provide for the diversification of employment of Federal prisoners, for their training and schooling in trades and occupations, and for other purposes", approved May 27, 1930, as amended and supplemented by the Act approved June 23, 1934.

SEC. 9. This Act shall not apply to purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market; nor shall this Act apply to perishables, including dairy, livestock and nursery prod-

ucts, or to agricultural or farm products processed for first sale by the original producers; nor to any contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof. Nothing in this Act shall be construed to apply to carriage of freight or personnel by vessel, airplane, bus, truck, express, or railway line where published tariff rates are in effect or to common carriers subject to the Communications Act of 1934.

SEPARABILITY CLAUSE

SEC. 10. If any provision of this Act, or the application thereof to any persons or circumstances, is held invalid, the remainder of the Act, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

SEC. 11. This Act shall apply to all contracts entered into pursuant to invitations for bids issued on or after ninety days from the effective date of this Act: *Provided, however*, That the provisions requiring the inclusion of representations with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

Approved, June 30, 1936.

APPENDIX A2

No. 504—REGULATIONS PRESCRIBED BY THE SECRETARY OF LABOR UNDER PUBLIC ACT NO. 846, SEVENTY-FOURTH CONGRESS

(SERIES A)

By virtue of the authority vested in the Secretary of Labor by section 4 of the Act entitled "An Act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes", (Act of June 30, 1936, Public, No. 846, 74th Cong.) and in order to establish uniform procedure under said act, the following Regulations are hereby prescribed:

PART I.—CONTRACT STIPULATIONS

ARTICLE 1. (Insertion of Stipulations).—Except as hereinafter directed, in every contract made and entered into by an executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States, for the manufacture or furnishing of materials, supplies, articles, and equipment, with respect to which invitations for bids are issued on or after September 28, 1936, the contracting officer shall cause to be inserted in such invitation or the specifications and in such contract, the following stipulations:

Representations and stipulations pursuant to Public Act No. 846, Seventy-fourth Congress:

(*a*) The contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract.

(*b*) All persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account,

not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under the contract: *Provided, however,* That this stipulation with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

(*c*) No person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of 8 hours in any 1 day or in excess of 40 hours in any 1 week, unless such person is paid such applicable overtime rate as has been set by the Secretary of Labor.

(*d*) No male person under 16 years of age and no female person under 18 years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in the contract.

(*e*) No part of the contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under such contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are insanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of the contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this subsection.

(*f*) Any breach or violation of any of the foregoing representations and stipulations shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of the contract, in the sum of $10 per day for each male person under 16 years of age or each female person under 18 years of age, or each convict laborer knowingly employed in the perform-

ance of the contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of the contract; and, in addition, the agency of the United States entering into the contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of the contract as set forth herein may be withheld from any amounts due on the contract or may be recovered in a suit brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: *Provided*, That no claims by employees for such payments shall be entertained unless made within 1 year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America.

(*g*) The contractor shall post a copy of the stipulations in a prominent and readily accessible place at the site of the contract work and shall keep such employment records as are required in the Regulations under the act available for inspection by authorized representatives of the Secretary of Labor.

(*h*) The foregoing stipulations shall be deemed inoperative, if this contract is for a definite amount not in excess of $10,000.

ART. 2. (Statutory Exemptions).—Inclusion of the stipulations herein enumerated is not required in the following instances:

(*a*) Where the contracting officer is authorized by statute or otherwise to purchase in the open market without advertising for proposals;

(*b*) Where the contract relates to perishables, including dairy, livestock, and nursery products; ("perishables" cover

products subject to decay or spoilage and not products canned, salted, smoked, or otherwise preserved);

(c) Where the contract relates to agricultural or farm products processed for first sale by the original producers;

(d) Where the contract is by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof;

(e) Where the contract is with a common carrier for carriage of freight or personnel by vessel, airplane, bus, truck, express, or railway line, where published tariff rates are in effect;

(f) Where the contract is for the furnishing of service by radio, telephone, telegraph, or cable companies, subject to the Federal Communications Act of 1934.

PART II.—ADMINISTRATIVE REGULATIONS

ART. 101. (Manufacturer or Regular Dealer):—A bidder or contractor shall be deemed to be a "manufacturer" or "regular dealer" within the meaning of the stipulation required by section 1 (a) of the act and article 1 (a) of these Regulations if he falls within one of the following categories:

(a) A manufacturer is a person who owns, operates, or maintains a factory or establishment that produces on the premises the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

(b) A regular dealer is a person who owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles, or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and sold to the public in the usual course of business.

Except as hereinafter provided, every bid received from any bidder who does not fall within one of the foregoing categories shall be rejected by the contracting officer.

Whenever justice and the public interest will be served, bids for a contract or class of contracts will be exempted

from the foregoing requirement by the Secretary of Labor upon the request of the head of the contracting agency or department when accompanied by his finding of fact that it will be so difficult to obtain satisfactory bids for the contract or class of contracts under the stipulated restrictions, that the conduct of Government business will be seriously impaired.

ART. 102. (Employees Affected).—The stipulations shall be deemed applicable only to employees engaged in or connected with the manufacture, fabrication, assembling, handling, supervision, or shipment of materials, supplies, articles, or equipment required under the contract and shall not be deemed applicable to office or custodial employees.

ART. 103. (Overtime).—Employees engaged in or connected with the manufacture, fabrication, assembling, handling, supervision, or shipment of materials, supplies, articles, or equipment used in the performance of the contract may be employed in excess of 8 hours in any 1 day or in excess of 40 hours in any 1 week, provided such persons shall be paid for any hours in excess of such limits the overtime rate of pay which has been set therefor by the Secretary of Labor.

Until otherwise set by the Secretary of Labor the rate of pay for such overtime shall be one and one-half times the basic hourly rate or piece rate received by the employee.

If in any 1 week or part thereof an employee is engaged in work covered by the contractor's stipulations, his overtime shall be computed after 8 hours in any 1 day or after 40 hours in any 1 week during which no single daily total of employment may be in excess of 8 hours without payment of the overtime rate.

ART. 104. (Dealer as Agent of Undisclosed Principal).—Whenever a dealer, to whom a contract within the Act and Regulations has been awarded, causes a manufacturer

to deliver directly to the Government the materials, supplies, articles, or equipment required under the contract, such dealer will be deemed the agent of the manufacturer in executing the contract. As the principal of such agent the manufacturer will be deemed to have agreed to the stipulations contained in the contract.

ART. 201. (Breach of Stipulations).—Whenever the Department of Labor notifies the head of a contracting agency that a contractor is liable for liquidated damages by reason of a breach of stipulations as provided in section 2 of the Act, there shall be withheld from any balance due under the contract such amount as may be necessary to satisfy such liability pending final disposition of the case.

Whenever a final determination of a breach of stipulations is made, the Secretary of Labor will furnish to the contracting agency a copy of the findings and decision with such recommendations as will assist the contracting agency in determining whether or not the contract should be canceled for such breach.

ART. 501. (Records of Employment).—Every contractor subject to the provisions of the Act and these Regulations shall maintain the following records of employment which shall be available for the inspection and transcription of authorized representatives of the Secretary of Labor:

(*a*) Name, address, sex, and occupation of each employee covered by the contract stipulations.

(*b*) Date of birth of each such employee under 21 years of age.

(*c*) Wage and hour records for each such employees including the rate of wages and the amount paid each pay period, the hours worked each day and each week, and the period during which each such employee was engaged on a Government contract with the number of such contract. Compliance with this subsection shall be deemed complete if wage and hour records for

all employees in the plant are maintained during the period between the award of any Government contract and the date of delivery of the materials, supplies, articles, or equipment: *Provided*, That where no separate records for employees engaged on Government contracts are maintained, it shall be presumed until affirmative proof is presented to the contrary that all employees in the plant, from the date of award of any such contract until the date of delivery of the materials, supplies, articles, or equipment, were engaged on such Government contract.

Such records shall be kept on file for at least 1 year after the termination of the contract.

ART. 601. (Requests for Exceptions and Exemptions).—Request for the exception or exemption of a contract or class of contracts from the inclusion or application of one or more of those stipulations required by article 1 must be made by the head of a contracting agency or department and shall be accompanied with a finding by him setting forth reasons why such inclusion or application will seriously impair the conduct of Government business.

Request for the exception or exemption of a stipulation respecting minimum rates of pay and maximum hours of labor contained in an existing contract must be made jointly by the head of the contracting agency and the contractor and shall be accompanied with a joint finding by them setting forth reasons why such exception or exemption is desired.

All requests for exceptions or exemptions shall be transmitted through the Procurement Division of the Treasury for submission to the Department of Labor for consideration and shall be returned through the Procurement Division.

ART. 602. (Decision Concerning Exceptions and Exemptions).—Decisions concerning exceptions and exemptions shall be in writing and approved by the Secretary of Labor or officers prescribed by him, originals being filed

in the Department of Labor, and certified copies shall be transmitted to the department or agency originating the request, to the Comptroller General, and to the Procurement Division of the Treasury. All such decisions shall be promulgated to all contracting agencies by the Procurement Division of the Treasury.

ART. 603. (Administrative Exemptions).—The following classes of contracts have been exempted from the application of article 1 of these Regulations pursuant to the procedure required under section 6 of the act:

(*a*) Contracts for public utility services including electric light and power, water, steam, and gas;

(*b*) Contracts which are to be performed outside the geographic limits of the United States, its Territories, and the District of Columbia, except where such performance requires a shipment from within such geographic limits;

(*c*) Contracts covering purchases against the account of a defaulting contractor where the stipulations required herein were not included in the defaulted contract.

ART. 701. (Definition of "Person").—Whenever used in these Regulations, the word "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

ART. 1101. (Minimum Wages).—Until a determination of the prevailing minimum wage for a particular industry or group of industries has been made by the Secretary of Labor prior to the invitation for bids, the stipulation with respect to wages in section 1 (*b*) of the Act will be inoperative, as provided in article 1 (*b*) of these Regulations.

Determinations of prevailing minimum wages or changes therein will be published in the Federal Register and sent to contracting officers through circular letters of the Procurement Division of the Treasury. Such determinations will be effective upon the dates fixed therein.

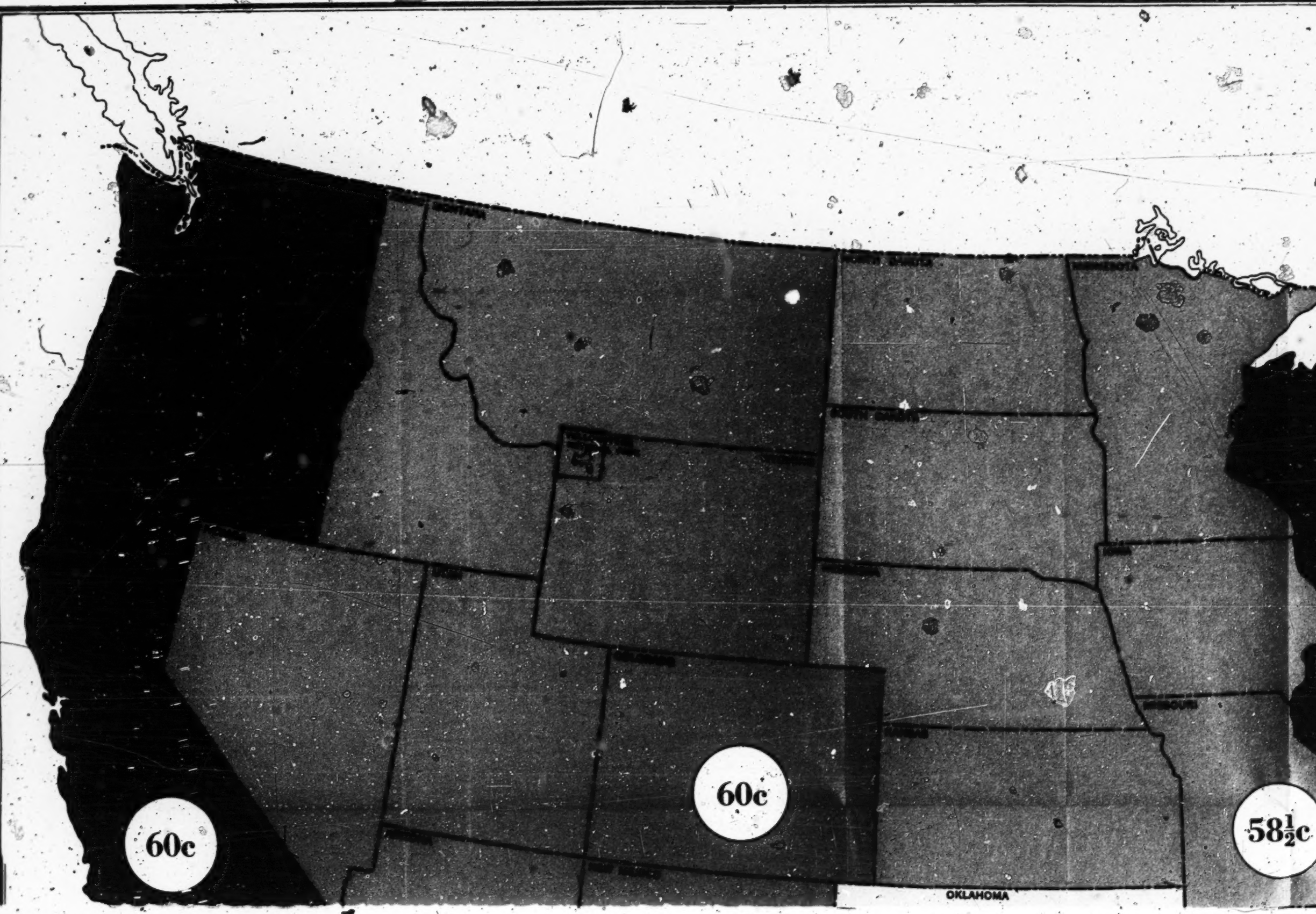
ART. 1201. (Reports of Contracts Awarded).—Whenever the contracting officer shall award a contract in which the stipulations required under article 1 are operative, he shall furnish the Department of Labor in duplicate on forms provided for this purpose, a statement showing the name of the contracting agency, the purchase order number, the material purchased, the date of award, the contract price, the proposed date of delivery, the contractor's name and address, and the name and location of the plant or plants fabricating or supplying the subject matter of the contract.

ART. 1202. (Complaints).—Whenever any officer or employee of the United States Government or of any agency thereof has any knowledge of or receives any complaint with respect to a breach or violation of the stipulations required under article 1, he shall transmit such complaint according to the usual practice in his department to the Department of Labor together with such other information as he has in his possession.

ART. 1203. (Other Contracts).—Nothing in these Regulations shall be construed as impairing the authority possessed by any contracting agency to require labor standards in contracts not covered by this act.

FRANCES PERKINS,
Secretary of Labor.

WASHINGTON, D. C., *September 14, 1936.*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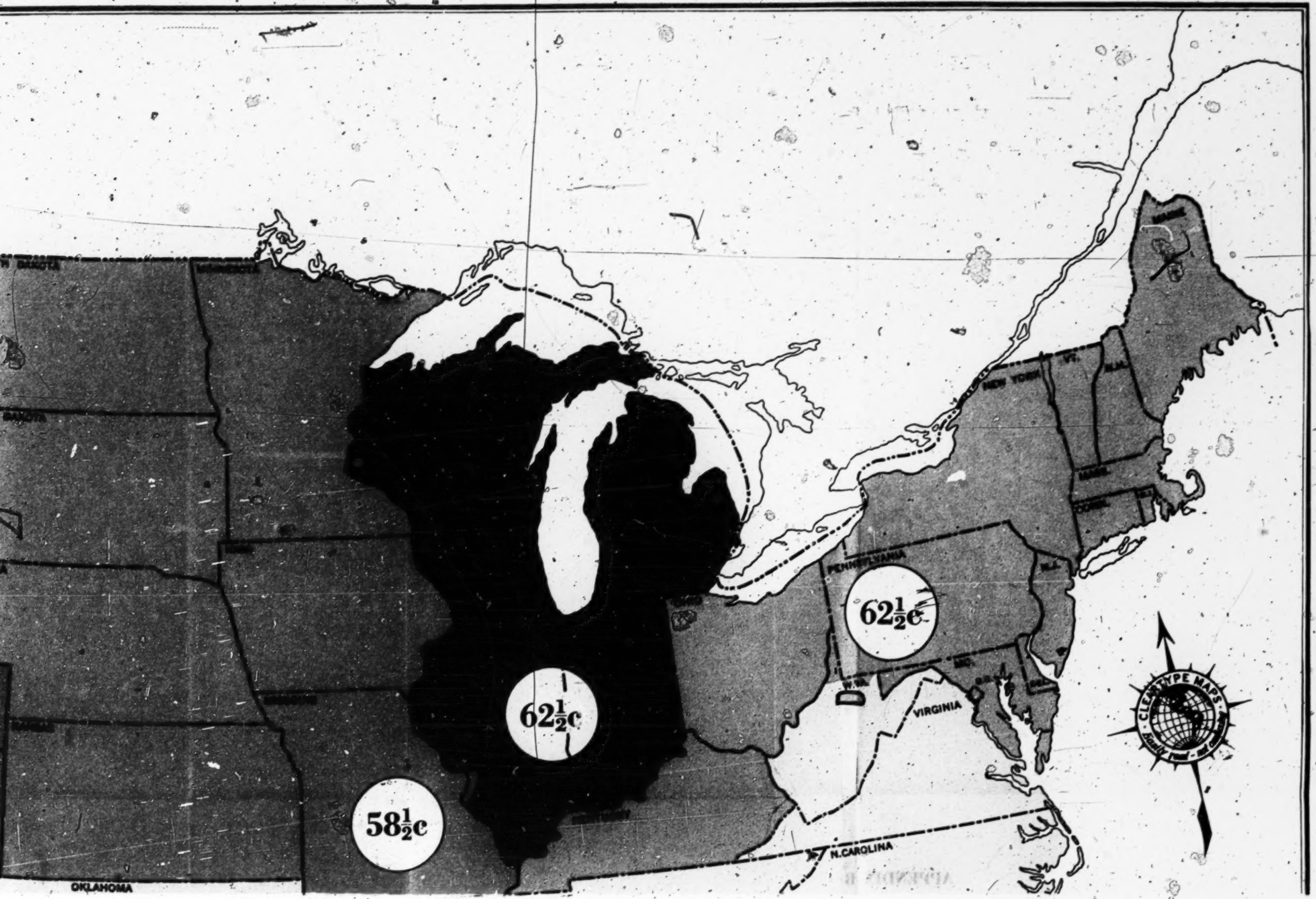
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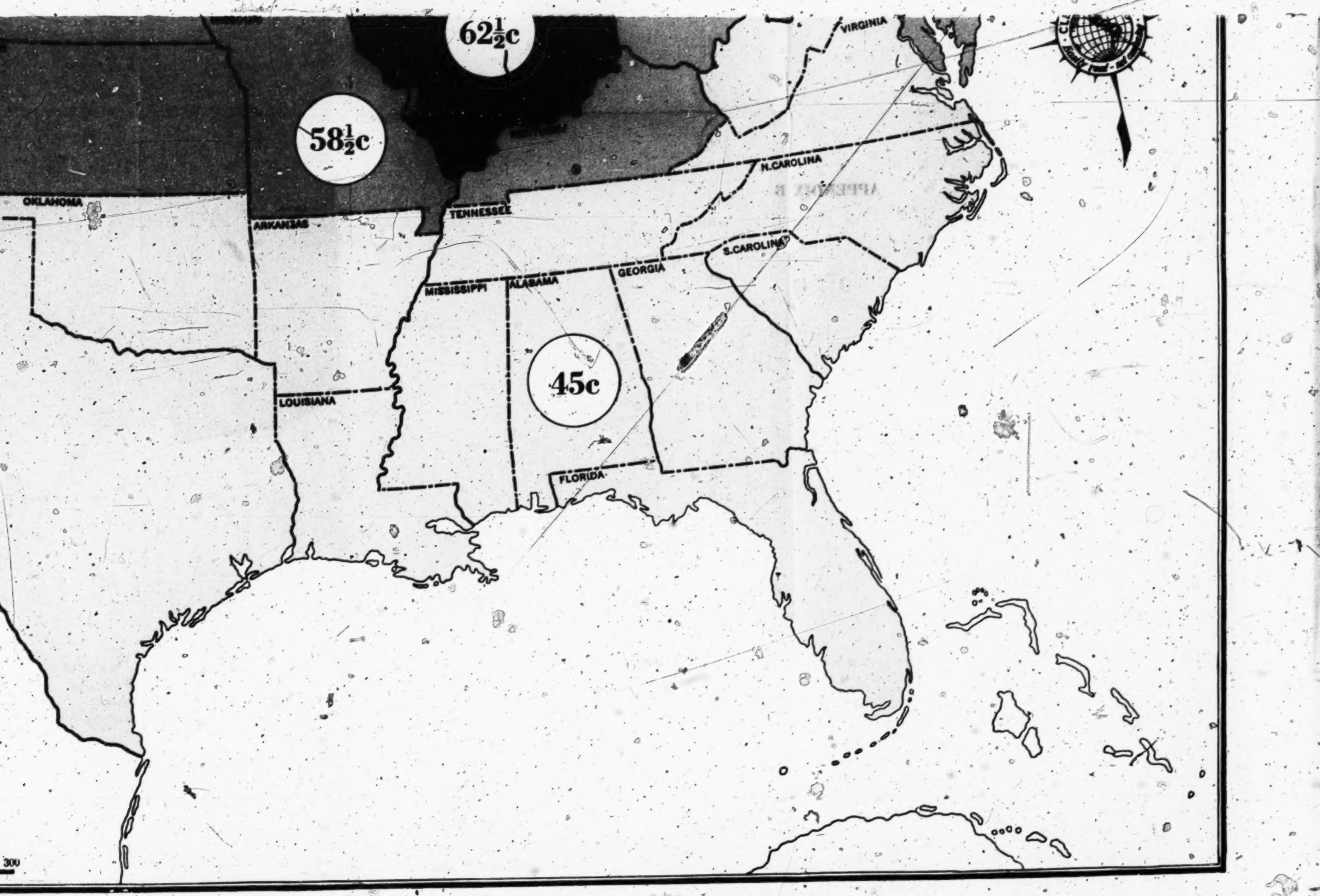
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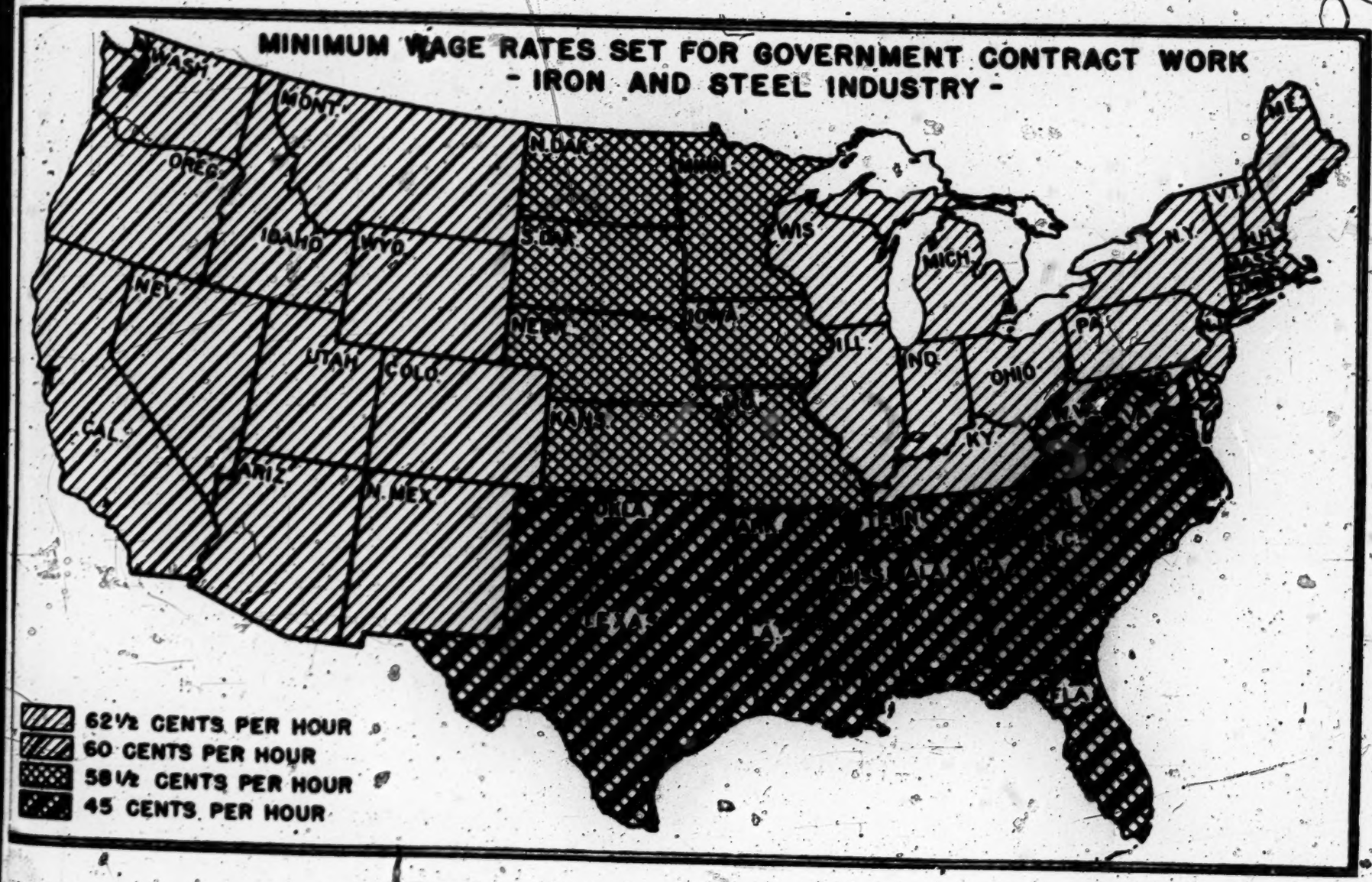
APPENDIX C


MINIMUM WAGE RATES SET FOR GOVERNMENT CONTRACT WORK
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CAL.
ARIZ.
N. MEX.
N. DAK.
S. DAK.
NEBR.
KANS.
OKLA.
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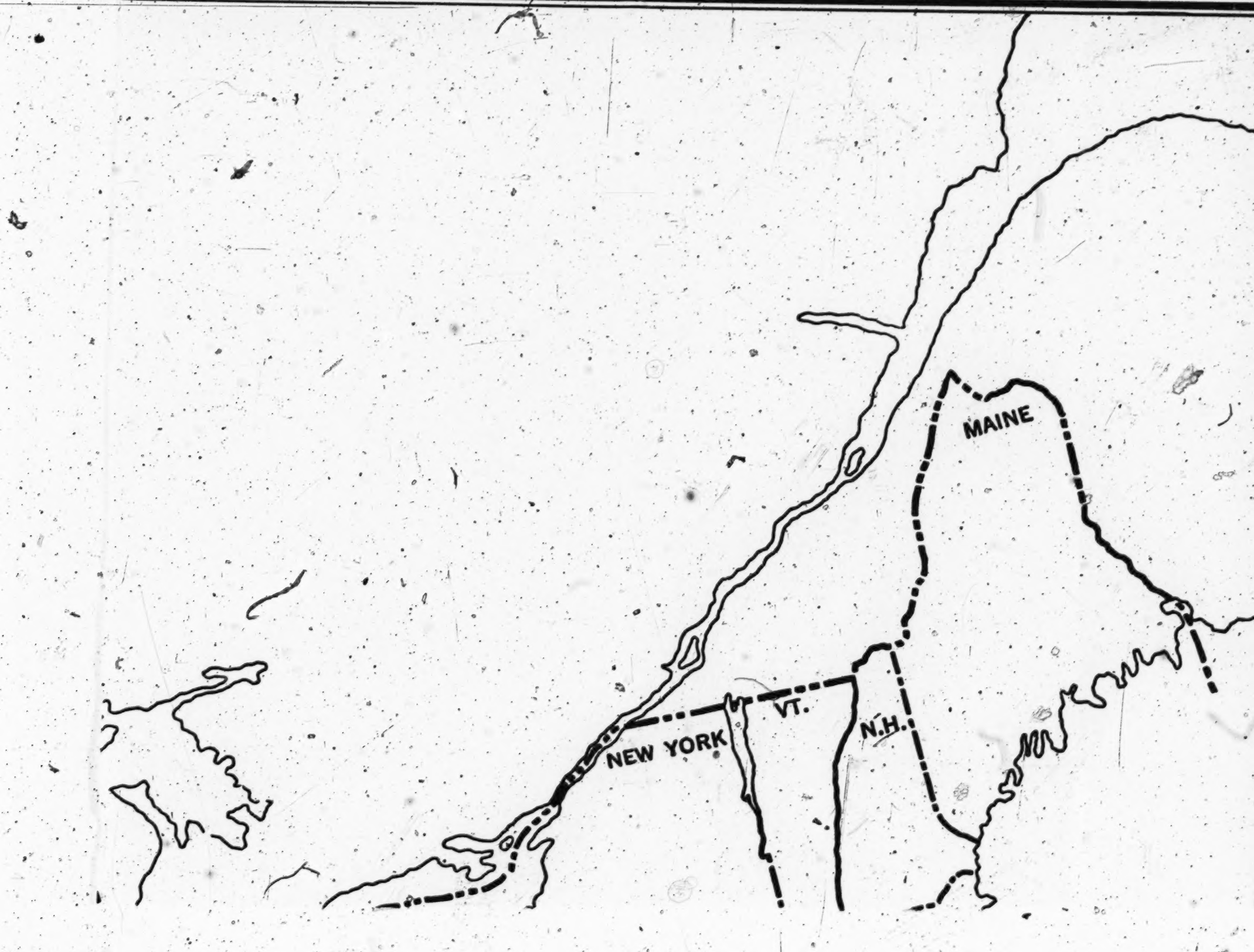
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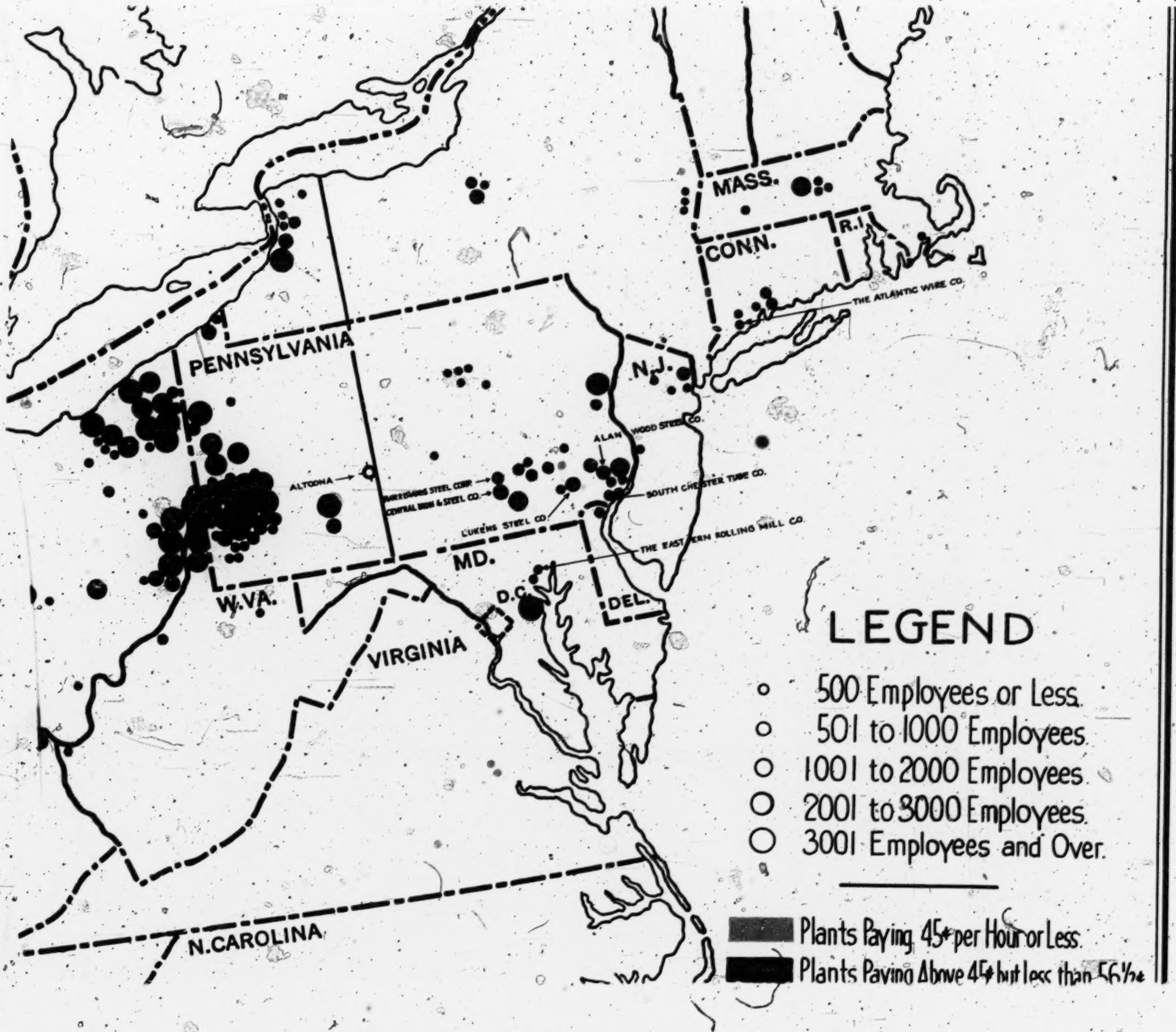
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LUKENS STEEL CO.
THE EASTERN ROLLING MILL CO.
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D.C.
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LEGEND
500 Employees or Less.
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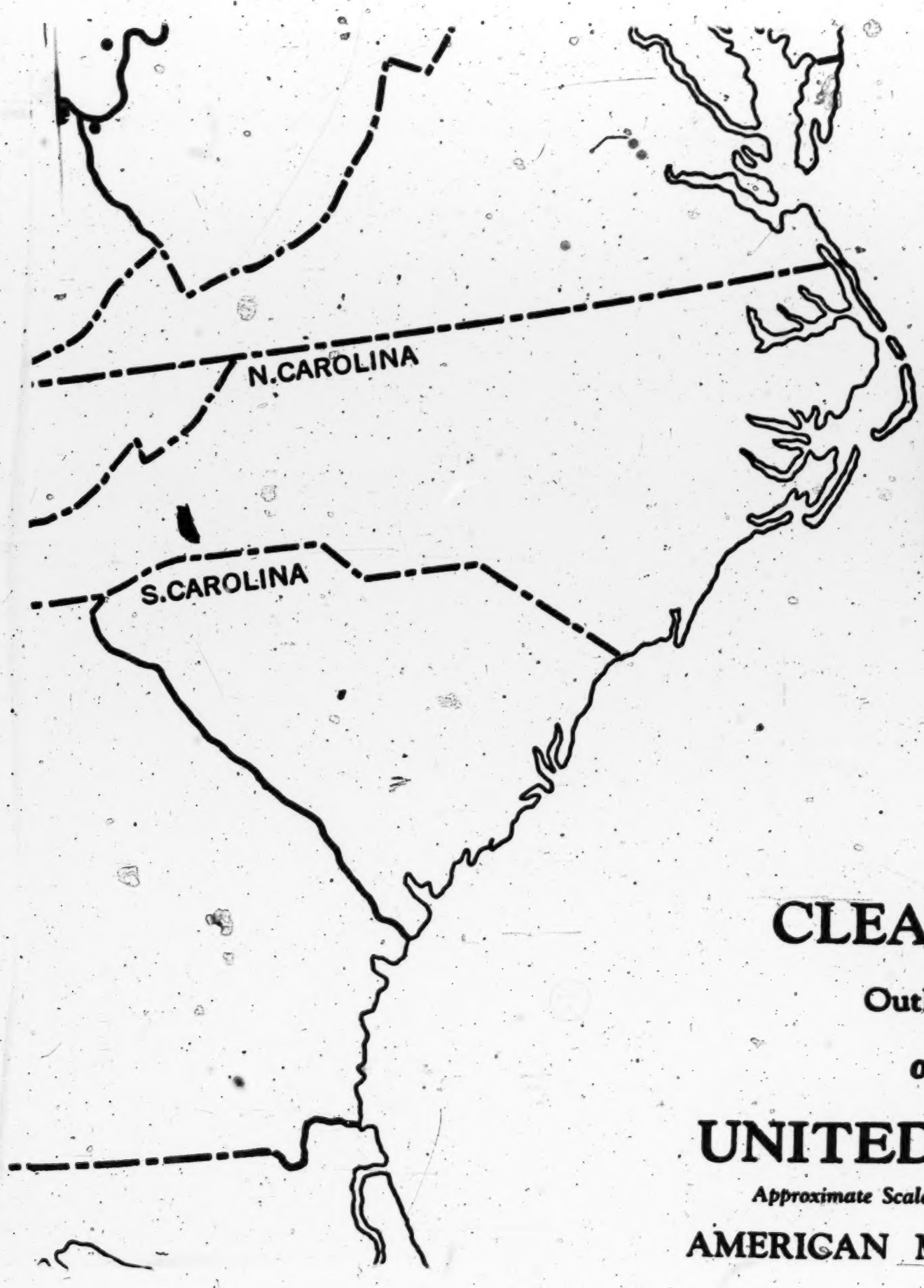
1001 to 2000 Employees.
2001 to 3000 Employees.
3001 Employees and Over.
Plants Paying 45¢ per Hour or Less.
Plants Paying Above 45¢ but Less than 56½¢



- 500 Employees or Less.
- 501 to 1000 Employees.
- 1001 to 2000 Employees.
- 2001 to 3000 Employees.
- 3001 Employees and Over.

- Plants Paying 45¢ per Hour or Less.
- Plants Paying Above 45¢ but Less than 56½¢
- Plants Paying 56½¢ and 57¢.
- Plants Paying Above 57¢ but Less than 62½¢
- Plants Paying 62½¢ and Over.

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Outline Map

of the

UNITED STATES

Approximate Scale - 39 Miles to the Inch

AMERICAN MAP COMPANY

of the

UNITED STATES

Approximate Scale - 39 Miles to the Inch

AMERICAN MAP COMPANY

Originators and Sole Manufacturers

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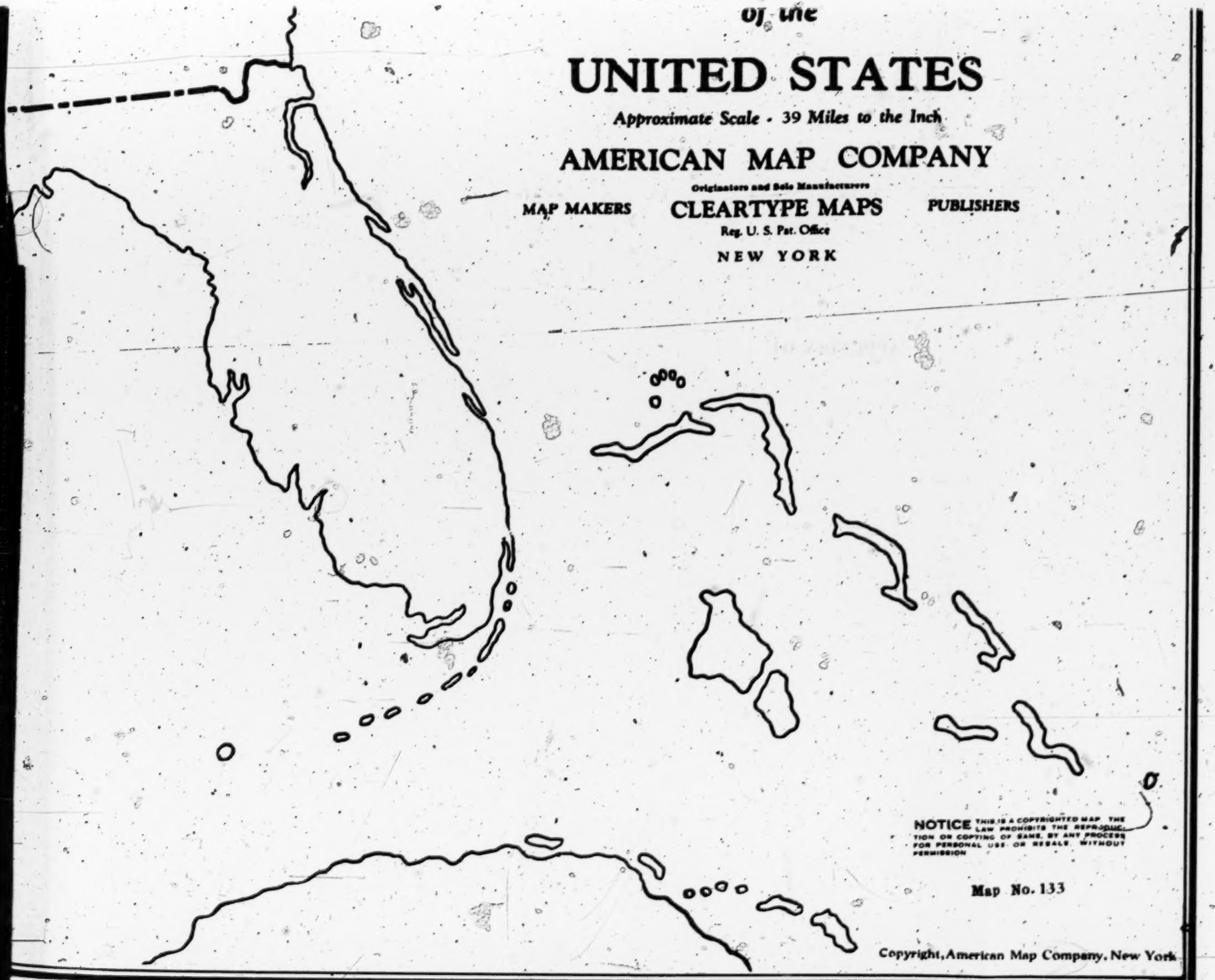

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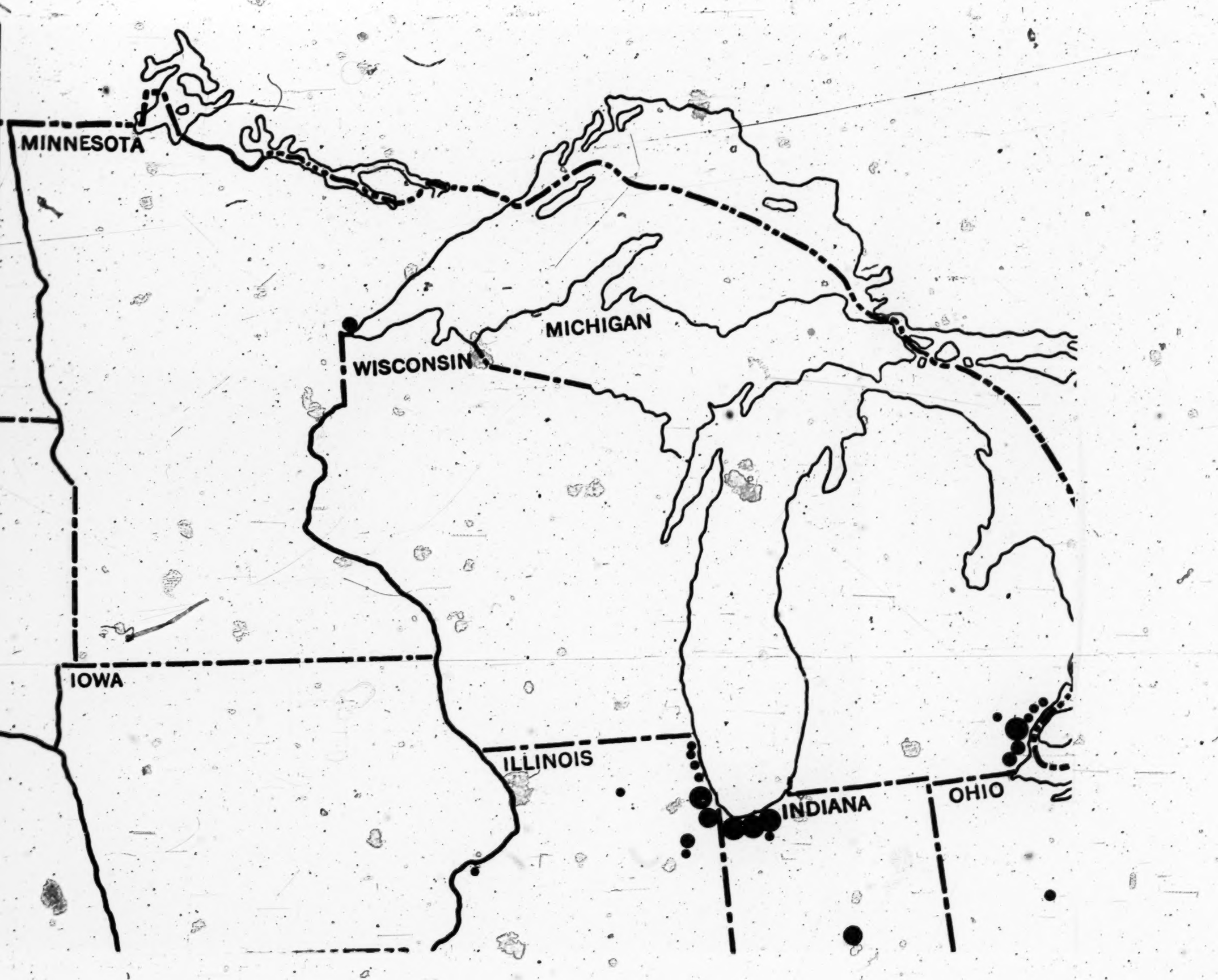
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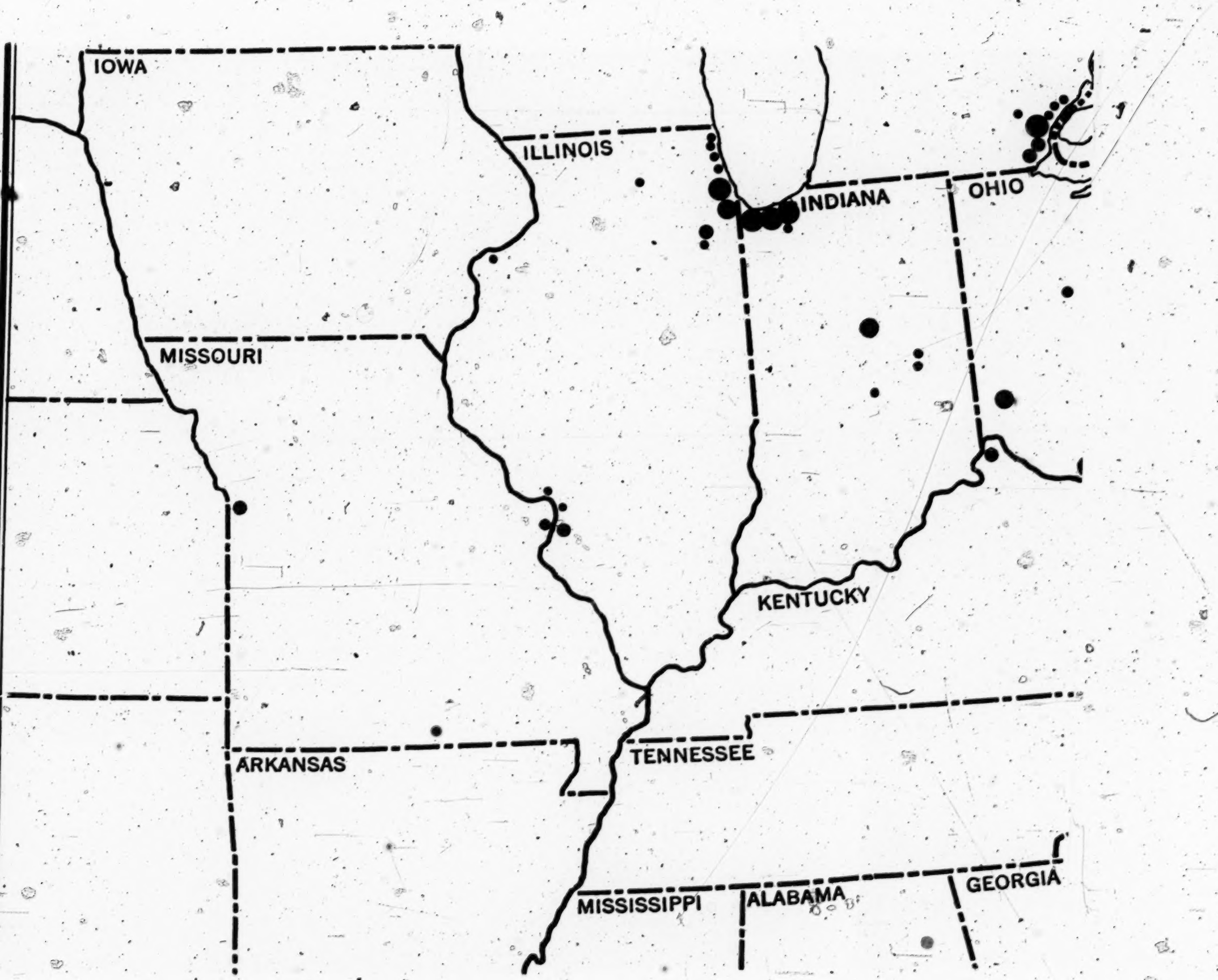
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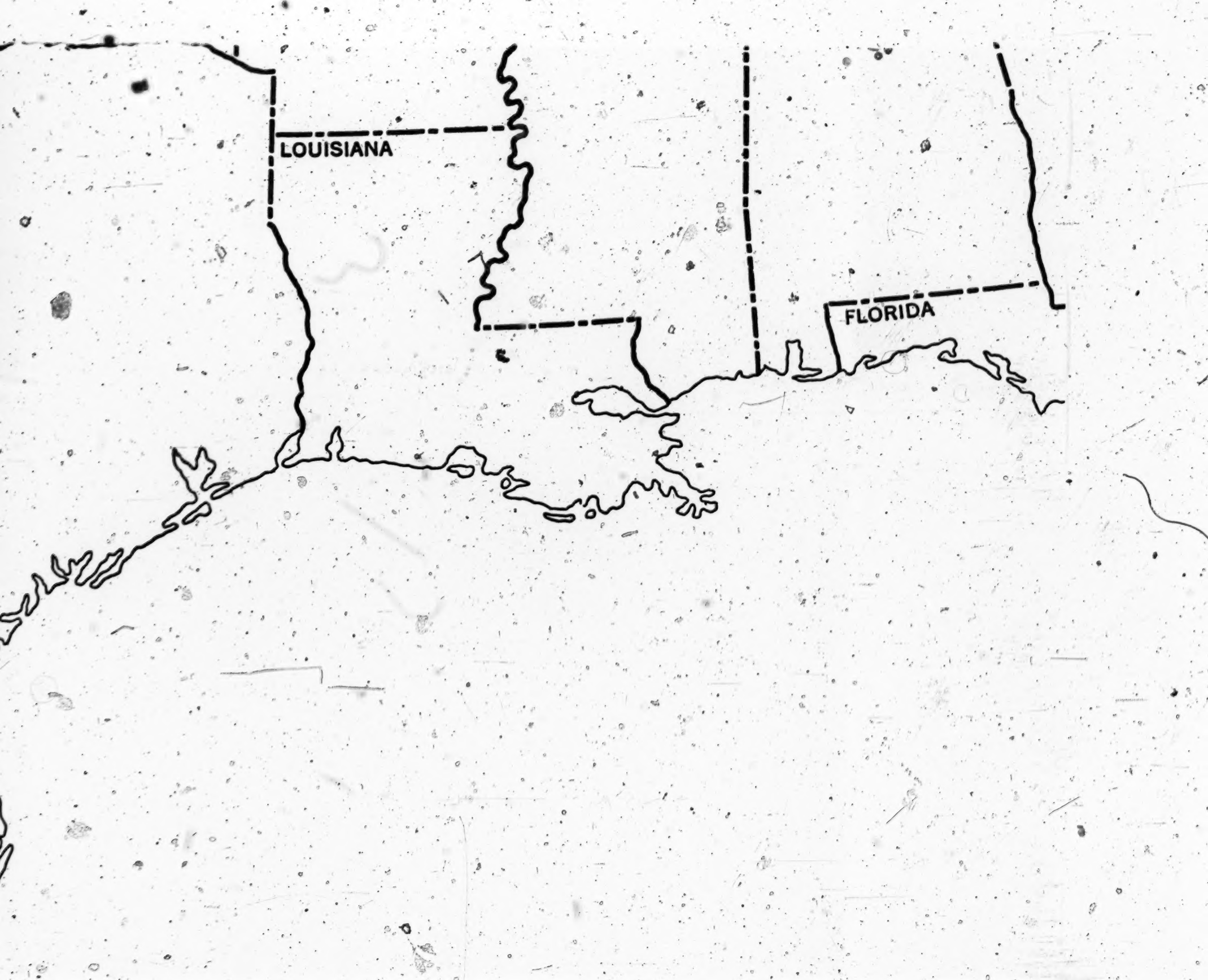
LOUISIANA
FLORIDA

FILED
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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1939

No. 593

FRANCES PERKINS, Individually and as Secretary of Labor of the United States, et al., *Petitioners*,

v.

LUKENS STEEL COMPANY, a corporation, et al., *Respondents.*

BRIEF FOR RESPONDENTS

WM. CLARKE MASON,
O. MAX GARDNER,
FREDERICK H. KNIGHT,
HAROLD F. McGUIRE,
ROBERTS B. THOMAS,
Counsel for Respondents.

GIBSON BROTHERS, INC., PRINTERS, WASHINGTON, D. C.

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The primary question presented is a pure question of law, viz., the proper construction of the term "locality", as employed in Section 1 (b) of the Walsh-Healey Act, which term delimits the jurisdiction or authority of the Secretary of Labor under the Act and to which petitioners either assign no meaning or, at most, a meaningless definition designed to permit the Secretary to determine her own jurisdiction, to cloak a usurpation of the power to fix wages and to obtain the same results as those obtained under a construction of the Act, now abandoned and concededly improper, which openly read the term out of the statute	30

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A. The authority of the Secretary under the Act is limited to the factual determination of minimum wages which prevail in "localities", and is conferred only to the end that each person seeking or contracting to supply goods to the Government may be required to agree to pay a minimum wage prevailing in the locality in which he is to manufacture or furnish such goods under his contract 30

B. Petitioners in their brief assign no meaning to the term "locality". They apparently abandon even the meaningless definitions heretofore advanced as a cloak to cover a clear usurpation of power, and the effect of their present position is to read the term out of the statute entirely 33

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4. The fact that the statute contemplates predetermination of wages in advance of bidding upon the contracts affected does not indicate, as petitioners suggest, that a "locality" may be the entire United States, or any portion thereof, as the Secretary of Labor may from time to time determine 60

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The legislative history of the Act confirms (A) that the authority of the Secretary of Labor under the Act is limited to the ascertainment of prevailing minimum wages in "localities", (B) that the term "locality", as therein employed, means a local center of manufacture, community or similarly described small geographical area, (C) that the Congress deliberately withheld from the Secretary the power either to fix wages in, or to eliminate wage differentials existing between, such localities, and (D) *a fortiori*, that the Congress withheld such powers over the economy of the vast regions in respect of which the Secretary now seeks, in effect, to assert them 65

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A. The Determination seeks to establish a uniform minimum wage in the Thirteen State Area notwithstanding the facts, *inter alia*,

(1) that wage differentials of long standing, based on differing economic conditions, exist between various major regions therein in which iron and steel are manufactured;

(2) that the iron and steel industry is not a sweatshop industry and the minimum wages paid therein in each of such regions are high wages; and

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IN THE

Supreme Court of the United States

October Term, 1939

No. 593

FRANCES PERKINS, Individually and as Secretary of Labor of the United States, et al., *Petitioners*,

v.

LUKENS STEEL COMPANY, a corporation, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals For the District of Columbia

BRIEF FOR THE RESPONDENTS

Opinions Below

The judgment of the District Court was entered without an opinion (R. 319-320). The opinions of the United States Court of Appeals for the Dis-

trict of Columbia, the court below (R. 387-410), are reported in 107 Fed. (2d) 627.

Jurisdiction

The jurisdiction of this Court has been invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

The Question Presented

The question presented is whether this Court should reverse a judgment (R. 410) of the United States Court of Appeals for the District of Columbia, holding (R. 388, 405) that the complaint (R. 2-45), as amended (R. 313-318), of respondents, seven of the smaller eastern steel companies (R. 9), sets forth facts sufficient to constitute a claim[1] for injunctive relief in respect of (R. 42-44), and a declaratory judgment as to the invalidity of (R. 44), a determination (R. 239-254,—hereinafter called the Determination), by petitioner McLaughlin, as Acting Secretary of Labor,[2] which he purported to make pursuant to the Public Contracts (Walsh-Healey) Act,[3] and in which he purported to "establish" (R. 254) the minimum wages which members of the iron and steel industry desiring to bid on and enter into Government contracts must agree to pay to employees engaged in the performance thereof.

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[1] The District Court had dismissed the complaint, as amended (R. 319-320).

[2] The Determination was made with the authorization, approval, consent and active participation of petitioner Perkins, Secretary of Labor (R. 24).

[3] Act of Congress approved June 30, 1936, Public No. 846-74th Cong.; 49 Stat. 2036-39, c. 881. Appendix (*I*), pp. 1-7.

The court below held (R. 388-405) that the Determination was "not only unwarranted" by the Act "but incongruous" (R. 390) because so far beyond the jurisdiction and authority of the Secretary of Labor thereunder as to be "a palpable evasion of the letter and spirit of the pertinent statute" (R. 396-397) and "an attempt arbitrarily to disregard the statutory mandate" (R. 390).

The basis of such decision was that, whereas the authority of the Secretary of Labor in making wage determinations under the Public Contracts Act is limited to the *ascertainment* of prevailing minimum wages in each "*locality*" (i. e., local center of manufacture or community) in which an industry the subject matter of a determination operates, the Acting Secretary in the Determination had attempted, *inter alia*, to *fix* a single minimum wage for the iron and steel industry in a vast *region* consisting of 13 states, part of a fourteenth, and the District of Columbia, and embracing a number of local centers of manufacture (including those in which respondents' plants are located) with lower prevailing minima, by the simple device of calling that vast region a "locality."

Having so held the court below found it unnecessary to consider the other grounds on which the validity of the Determination was challenged.

The Specific Issues Raised

The specific substantive issue raised is:

Is the Determination invalid because

(a) it was beyond the jurisdiction or authority of the Secretary of Labor under the Public Contracts Act?

(b) it was arbitrary and capricious?

(c) it was not based on the fair and impartial hearing required by the Act?

The specific procedural questions thus raised are:

(a) Do respondents have a standing to sue?

(b) Is the administrative action complained of subject to judicial review?

(c) Is the suit one against the United States?

(d) Do the facts alleged in the complaint entitle respondents to the injunctive relief prayed?

(e) Do the facts alleged in the complaint entitle respondents to a declaratory judgment?

The Statute Involved

The Public Contracts (Walsh-Healey) Act, herein sometimes called the Act, is printed at pp. 1-7 of the Appendix (I) filed herewith. In so far as here material, the Act provides, in substance, as follows:

Section 1 (b) provides that in any Government contract for the manufacture or furnishing of supplies in an amount exceeding $10,000, there shall be included a stipulation that all persons employed by the contractor in performing the contract will be paid "not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed"

(a) "on similar work" "or"

(b) "in the particular or similar"

(i) "industries or"
(ii) "groups of industries"
"currently operating"

"in the *locality* in which the * * * supplies * * * are to be manufactured or furnished under said contract * * *."

Section 11 provides that Section 1(b) shall apply only to contracts relating to such industries as have been the subject matter of a determination by the Secretary.

Sections 2 and 3 provide for "liquidated damages" in the amount of any underpayment of wages resulting from breach of a minimum wage stipulation (§ 2); contract cancellation for any such breach (*ibid.*); and black-listing from award of Government contracts for three years of any person found by the Secretary to have committed any such breach (§ 3).

Sections 4 and 5 authorize the Secretary to administer the Act, to make rules and regulations necessary to carry out its provisions, and to make necessary appointments (§ 4); confer power upon the Secretary or his authorized or designated representatives to make investigations and findings as provided in the Act (§ 4) and to hold hearings and to issue orders requiring testimony and evidence under oath relating to the matter under investigation or in question (§ 5); require that the Secretary or such a representative "shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States" (§ 5); and author-

ize the Secretary or such representative to make such "decisions", based upon findings of fact, as are deemed to be necessary to enforce the provisions of the Act (§ 5).

A copy of the present regulations under the Act (No. 504)[3] is set forth in the Appendix (II, pp. 8-17) filed herewith.

STATEMENT OF FACTS

1. The proceedings leading up to the Determination.

Under date of July 11, 1938, petitioner Walling, the Administrator of the Division of Public Contracts, issued notice (R. 45-46) that a hearing would be held before the Public Contracts Board, appointed by the Secretary of Labor, "to take testimony upon which findings of fact will be made to assist the Secretary * * * in determining * * * the prevailing minimum wages in the Iron and Steel Industry". On July 25 and 26, said Board held a "hearing", at which it received unsworn "evidence" and at which respondents were represented (R. 15-16).

On the basis of such "hearing" the Board made Findings of Facts, Conclusions, and Recommendations, dated October 27, 1938, hereinafter called the Report (R. 17). A copy of the Report (R. 47-218) is annexed as an exhibit to the complaint. It consisted of a majority report (R. 47-207) containing the facts found by all members of the

[3] Such regulations were amended as of April, 1939, but in no respect having any bearing on the questions here presented.

Board (R. 207) and the conclusions and recommendations of two of its three members, and a minority opinion (R. 207-218) by the third member stating his conclusions and recommendations.

In the Report, the Board made findings as to the minimum wages (common labor base rates [4]) paid in 234 of the country's 461 iron and steel plants, and the respective locations of such plants (R. 62-74; 77-113). But proceeding on the assumption that the Public Contracts Act did not limit the jurisdiction of the Secretary of Labor to the determination of prevailing minimum wages in "localities", but on the contrary authorized the Secretary to determine prevailing minimum wages in respect of a particular industry "either as a whole or over broad geographical regions" (R. 160),—an interpretation of the Act theretofore followed by the Department of Labor and its Secretary,[5]—the Board *frankly* made no effort to determine the minimum wages for iron and steel.

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[4] This rate is paid to about 8.6% of the workers in the industry (R. 58). It is "substantially a rock-bottom rate" on which wages paid to all other workers are based (R. 60-61). Consequently, all other hourly wages paid will vary with this basic common labor rate (*ibid.*).

[5] See O. R. Strackbein (Member, Public Contracts Board, U. S. Department of Labor) "The Prevailing Minimum Wage Standard" (1939), pp. 30-31: "The Department of Labor interpreted this language [i.e. Sec. 1 (b) of the Act] as providing four alternatives. The standard, thus interpreted, was held to be the prevailing minimum wages for persons employed (1) on similar work; (2) in the particular industry; (3) in similar industries; or (4) in groups of industries currently operating in the locality.

"Under this interpretation, the restrictive clause 'currently operating in the locality' modifies only the fourth alternative, i.e., groups of industries; and the Secretary of Labor is free to disregard the stricture when any one

workers prevailing in the various localities from which the Government might be supplied with iron and steel. It did, however, frequently recognize that different minimum wages prevailed in numerous "producing centers" and "localities" (see, e.g., R. 176-179, 190-192).

The majority recommended (R. 206-207) that the Secretary determine a prevailing minimum wage of 45c. an hour "within the area made up of" the 12 Southern States, running from Virginia to Texas and Oklahoma, and 62½c. an hour "within the area made up of" the remaining 36 States.[6] The minority differed from the majority in recommending that such 36 states should be divided into four sections and that specified prevailing minimum wages be determined in each (R. 216-218), including "the eastern section" (R. 216),—the "region lying east of what is generally known as the Pittsburgh district" (R. 209),—in which a minimum wage of 56½c. per hour was said to prevail (R. 209-216).

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of the other three alternatives is utilized, i.e., similar work, the particular industry, or similar industries."

To the same effect, see *In the Matter of Determination of Prevailing Minimum Wages in the Men's Work Clothing Industry*, 2 Fed. Reg. 233.

[6] The Board found that competition in the industry was virtually nation-wide (R. 183, 189). The principal basis upon which the majority determined a different prevailing minimum wage for the 12 Southern States than for the 36 Northern States was the existence of geographic wage differentials between those two regions (R. 159). Although admitting at the same time the existence of geographic wage differentials in the eastern part of the United States, it ignored them because "on the whole, the variations among them are not large" (R. 189).

2. The Determination.

The matter subsequently came on for oral argument before the Acting Secretary,[7] who handed down the Determination (also annexed to the complaint—R. 239-254) under date of January 16, 1939.

In the argument before the Acting Secretary there was no dispute (and there is none now) regarding the Board's "finding[s] as to the wages actually being paid in the industry" (R. 241), which were accordingly adopted by the Acting Secretary (*ibid.*, R. 314), but only as to the "conclusions" and "recommendation[s] based on these wage facts" (R. 241). All objections thereto were said to turn "upon the construction to be placed upon the language of Section 1 (b) of the Public Contracts Act" (R. 242),—a question of law the decision of which underlay the entire Determination.

Apparently conceiving that it was hopeless further to deny that the authority of the Secretary of Labor under the Act is limited to the determination of prevailing minimum wages in "localities", —as is now conceded by petitioners,—the Acting Secretary in the Determination rendered lip service to the statute by purporting to construe the term "locality", as employed in Section 1(b) (R. 242-246), and then to select geographical "areas" (R. 247-250) comprehended within his unique

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[7] Respondents having theretofore filed a petition to reopen the hearing before the Board (R. 20-21; 218-230), and such petition having been denied (R. 21-22), they filed exceptions to the Report (R. 21-22; 231-239) and a brief in support thereof (R. 22) and participated in such oral argument (R. 22).

definition of "locality" and to determine prevailing minimum wages therein.

The Acting Secretary took the position that the term "locality" means any area, however large, which the Secretary of Labor may select, in the light of "economic facts" pertaining to the particular industry, for the purpose of determining prevailing minimum wages (R. 26, 244-247).[8] In the Determination it was disingenuously implied (R. 245) that this "construction" was the "consistent administrative construction" of the Act; and in the District Court the petitioners stated that the meaning of the word "locality" contained in the Determination "follows the administrative construction consistently adhered to by the Secretary of Labor since the passage of the Public Contracts Act."[9] This myth was exploded by the decision of the court below (R. 393-394). The Solicitor General now properly explains (Pet. p. 17, n. 5; Petitioners' Brief,[10] p. 131) that what the Acting Secretary meant was that the result obtained by such "construction" was "wholly consistent" with

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[8] The definition of "locality" suggested in the petition for certiorari herein (p. 15) was "an area of small or large extent according to the economic facts of the particular industry." Petitioners have apparently abandoned this definition in their brief. The definition, if it may be called such, of the word "locality" now given by them is apparently an area "of any dimensions appropriate under the particular circumstances in the administration of the Act" (Br. p. 116), which area "is *prima facie* as broad as the area within which all of the possible bidders are located" (Br. p. 117). See discussion, pp. 33-37, *infra*.

[9] Page 12 of petitioners' supplemental notes and authorities filed in the United States District Court for the District of Columbia in support of their motion to dismiss respondents' complaint.

[10] Hereinafter cited simply as "Br."

the "results" obtained by the earlier "construction", which had entirely *read out* of the Act the requirement that the Secretary, in determining the minimum wages to be paid by the members of an industry, respectively, must determine such wages prevailing in "localities", and which had led to determinations of such wages for the nation as a whole [11] or over broad geographical regions.[12]

The "consistent result" obtained in this case was as follows:

The Determination divided the entire United States into six areas, designated as "localities" (R. 253-254). It stated that "in the *locality* consisting of Ohio, Pennsylvania, Delaware, Maryland, Kentucky, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, and Maine, and that portion of the State of West Virginia comprised within the counties of Hancock, Brooke, Ohio, Marshall, Harrison,[13] and Monongalia, and the District of Columbia," the prevailing minimum wage was deter-

[11] See, e.g., the minimum wage determinations for the Men's Work Clothing Industry, 2 Fed. Reg. 233; the Cotton Garment and Allied Industries, 2 Fed. Reg. 1333; and the Work Glove Industry, 2 Fed. Reg. 1339.

[12] See, e.g., the minimum wage determinations for the Men's Underwear Industry, 2 Fed. Reg. 1337; and the Luggage and Saddlery Industries, Fed. Reg. (Daily) July 15, 1938, p. 1733.

[13] Not the least startling "result" of the Acting Secretary's "flexible" and "reasonably broad interpretation" (Petition for certiorari, pp. 16, 17) of "locality" was that the county of Harrison, West Virginia, although *entirely surrounded* by the southern "locality" designated by him, was nevertheless "determined" to be a part of the "northern locality" in which respondents' plants are situated. (See Appendix VIII.)

mined to be, and was "established" at, 62½c. per hour (R. 254). This area, consisting of 13 states, part of a fourteenth [13] and the District of Columbia, is hereinafter sometimes called the Thirteen State Area. The eastern portion of such area had been frankly characterized in the Report as a "region" (R. 209).

In the other five so-called "localities" selected in the Determination, viz.:

(1) The "southern area", consisting of 12 states [14] and 49 counties of West Virginia (R. 247), which area, prior to the addition of the West Virginia counties, had been viewed by the Board as a "region" covering "a very large territory" (R. 159),

(2) The 3 west "coastal states" [15] (R. 248),

(3) The 8 "mountain states" [16] (R. 248),

(4) The 7 "remaining states east of the mountain states and west of the Mississippi," [17] and the area about East St. Louis, Illinois (R. 248, 253), and,

(5) The 4 states in the "area immediately to the east of the trans-Mississippi locality" [18] (R. 249),

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[14] Louisiana, Arkansas, Mississippi, North Carolina, South Carolina, Florida, Oklahoma, Texas, Alabama, Tennessee, Georgia and Virginia.

[15] Washington, Oregon and California.

[16] Montana, Idaho, Nevada, Wyoming, New Mexico, Utah, Colorado and Arizona.

[17] North Dakota, South Dakota, Nebraska, Kansas, Minnesota, Iowa and Missouri.

[18] Wisconsin, Illinois (except the area in and around East St. Louis, Illinois), Michigan and Indiana.

the hourly prevailing minimum wages were determined to be, and were "established" at, 45c., 50c., 60c., 58½c. and 62½c., respectively (R. 253-254). Thus the upshot of the Determination was that four minimum-wage areas were fixed, the 62½c. area running from the Atlantic Ocean to the Mississippi and from Maine to Kentucky.

For the convenience of the Court there are set forth in Appendixes VIII, IX and X, respectively, filed herewith:

(a) A map of the United States showing the six areas designated as "localities" in the Determination, and the minimum wages "established" in each (Appendix VIII);

(b) A copy of a map contained in the February, 1939, issue of the Labor Information Bulletin, published by the Department of Labor, which shows the areas in which the four wage rates established by the Determination were "set" (Appendix IX); and

(c) A map of the United States depicting (i) the approximate location of the plants in the iron and steel industry concerning which wage data are set forth (R. 63-74) in the Report of the Board; (ii) the common labor base rate paid by each such plant; and (iii) a classification of such plants by the number of wage earners employed thereat (Appendix X).

The Determination, as modified by a subsequent order of the Acting Secretary (R. 254) amending

in this respect his previous "decision",[19] was, by its terms, to have become effective on March 1, 1939.

3. The location of respondents' plants; the minimum wages paid thereat; and the collective bargaining agreements pursuant to which they are paid.

Respondents operate iron and steel plants[20] in Coatesville,[21] Ivy Rock, Conshohocken, Swedeland,[22] Chester,[23] and Harrisburg,[24] Pennsylvania; Colgate, Maryland[25]; and Branford, Connecticut[26] (R. 3-8),—all within the Thirteen State Area. The minimum wages (common labor base rates) paid by them vary, depending on the particular respondent and the particular locality in which its plant is situated, from 56½c. per hour to 52½c. per hour

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[19] Compare Section 5 of the Act.

[20] Respondents manufacture and sell a variety of iron and steel products including steel plates (both sheared and universal), flanged and dished heads, steel and wrought iron pipe, hot and cold rolled sheets, hot rolled annealed sheets, galvanized, black and stainless sheets, plain and galvanized wire, gas cylinders, aerial bombs, flanges, coils and couplings (R. 3-8).

[21] Approximately 40 miles from Philadelphia and 310 miles from Pittsburgh.

[22] Ivy Rock, Conshohocken and Swedeland are located approximately 15 miles from Philadelphia and 340 miles from Pittsburgh.

[23] Chester is located approximately 15 miles southwest of Philadelphia and 330 miles from Pittsburgh.

[24] Harrisburg is located approximately 100 miles from Philadelphia and 250 miles from Pittsburgh.

[25] Colgate, Maryland, is located approximately 340 miles from Pittsburgh.

[26] Branford, Connecticut, is located approximately 520 miles from Pittsburgh.

(R. 3-8, 313).[27] In four instances such minimum wages (of 58c. and 56½c. per hour) are paid pursuant to collective bargaining agreements with either the Steel Workers Organizing Committee[28] (R. 4-5, 8) or the Amalgamated Association of Iron, Steel and Tin Workers of North America[29] (R. 6).

4. The purpose and effect of the Determination.

The purpose and effect of the Determination were to *fix* in various localities in which iron and steel products are produced minimum wages *never theretofore prevailing therein.* Such was clearly the case in respect of the localities in which respondents' plants are located, and, space permitting, the same could be shown for many other localities (see e. g. R. 137, 138, 140, 148, 151, 165, 176, 178-180).

It is undisputed that the 62½c. minimum wage established for the Thirteen State Area is not the prevailing minimum wage for iron and steel workers in, or in the vicinity of, any city, county, or

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[27] Respondents Lukens Steel Company, Alan Wood Steel Company, and South Chester Tube Company pay minimum wages of 56½ cents per hour (R. 3, 5, 6); respondents Central Iron & Steel Company and Harrisburg Steel Corporation pay minimum wages of 54 cents per hour (R. 6, 7); respondent The Eastern Rolling Mill Company pays a minmum wage of 53 cents per hour (R. 8); respondent The Atlantic Wire Company pays a minimum wage of 52½ cents per hour (R. 313).

[28] The three agreements with the Steel Workers Organizing Committee provide, in effect, for common labor base rates of 56½ cents (in two instances) and 53 cents per hour.

[29] The agreement with this union provides, in effect, for a common labor base rate of 56½ cents per hour.

other State civil subdivision in which any of respondents' plants is located, or in any small geographical area surrounding any such plant, city, county, or other civil subdivision (R. 314, 255, 63-77; see Appendix X).

In fact, a 62½ cent minimum wage is paid by only one plant and to only 8 employees in the iron and steel industry in all the cities, counties, villages and other State civil subdivisions in which plants of respondents are located (*ibid.*).

The Acting Secretary sought to fix such wage in such localities by the simple device of:

(a) including them in a larger region also embracing Pittsburgh, Youngstown, and other localities to the west enjoying various geographical advantages, in which the prevailing minimum wages for iron and steel workers have for many years been higher than those in the localities in which respondents' plants are situated, and

(b) labelling such large region a "locality" (R. 29-30, 37-38, 314-316).

But the purpose and effect of the Determination were more sweeping. A glance at Appendix X will reveal that by the same process the Acting Secretary sought to fix in one of the great industrial and geographical regions of the nation a minimum wage never theretofore prevailing therein.

Thus, although a minimum wage rate lower than 62½c. per hour is paid by all but three plants (operated by one company and employing 115 common laborers) out of a total of 58 plants (employing 5,389 common laborers) located in what is

known in the industry as the "Eastern District" [30] —being the entire area of the United States east of Altoona, Pennsylvania, and north of Virginia, plus that portion of Maryland west of the Altoona line and certain counties of West Virginia (R. 255; see Appendix X),—the Acting Secretary nevertheless established a 62½c. minimum wage therein. And he did so, notwithstanding the fact that the Bureau of Labor Statistics of his own Department had for many years recognized [31] that such "Eastern District" was an area between which and the so-called "Pittsburgh district" to the west [32] (grouped with it in the Determination) there had long existed a geographic wage differential in the iron and steel industry.[33]

[30] This was a code district for minimum wage *fixing* purposes under the N. I. R. A. Code of Fair Competition for the Iron and Steel Industry (R. 190). The plants of all respondents are situated in communities in such area.

[31] See, among other publications of the Bureau, Bulletin No. 151, May, 1914; Bulletin No. 353, April, 1924; Bulletin No. 567, December, 1932; Serial No. R. 380; Serial No. R. 415; Serial No. R. 430; and Serial No. R. 446.

[32] The most recent description of such districts is contained in Serial No. R. 380 (reprint from Monthly Labor Review for April, 1936), p. 3.

[33] The following compilation of the average hourly earnings (in cents per hour) of common labor in specified departments of the iron and steel industry is taken from United States Bureau of Labor Statistics Bulletins (No. 513, Table 4, No. 567, Table 6, and No. 403, Table 3):

Year	*Eastern*	*Pittsburgh*	*Year*	*Eastern*	*Pittsburgh*
1907	13.4	15.4	1919	39.8	48.0
1908	12.0	15.6	1920	45.1	53.0
1909	12.3	15.2	1922	32.2	36.0
1910	14.2	16.4	1924	38.6	45.1
1911	14.1	16.6	1926	37.4	45.2
1912	14.4	16.7	1929	37.5	45.3
1913	15.7	19.0	1931	35.1	45.9
1914	15.6	19.0	1933	29.1	35.8
1915	15.5	19.0	1935	41.4	46.6
1917	27.8	30.1			

The wage differentials [34] existing at the time of the Determination between the plants in the iron and steel industry located in the western portion (which includes Pittsburgh and Youngstown and is hereinafter sometimes called the Western District) [35] of the Thirteen State Area and those plants which the Determination included in the Thirteen State Area but which are also located in what are known in the Industry as the "Eastern District" [36] (as in the case of respondents' plants), the "Buffalo District" [36] and the "Johnstown District" [36] are shown by the following tabulation of common labor base rates taken from the undisputed wage data set forth in the Report of the Public Contracts Board (R. 63-74; see also R. 255-257):

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[34] As pointed out in the Argument, both the express language of the Act and its legislative history show that the Secretary of Labor was given no power to eliminate geographic wage differentials.

[35] We do not mean to indicate by this classification that there are not also geographic wage differentials existing in what we have spoken of as the "Western District". That there are such differentials is shown conclusively by the record (R. 257, 63-74, 190, 191) and Appendix X. The same thing is true of the Eastern District referred to in the text. We deliberately select these large regions, however, in order to show that, even if large territorial areas be selected as criteria, the Determination is nevertheless invalid.

[36] The term "Eastern District", as employed herein, describes the entire area of the United States east of Altoona, Pa., and north of Virginia, as well as that portion of Maryland west of the Altoona line and that portion of West Virginia lying south of a line drawn west in extension of the southerly boundary of Pennsylvania (R. 29). The term "Buffalo District", as so employed, describes that part of the State of New York lying west of the westerly boundary of the Eastern District and the Counties of Erie, Crawford and Warren, in the State of Pennsylvania. The term

	No. of Plants	No. of Wage Earners	No. of Common Laborers
EASTERN DISTRICT—BASE RATES			
Under 56½c	30	7,660	1,203
Exactly 56½c	18	38,069	3,854
Exactly 57c	5	4,005	194
Over 57c but under 62½c	2	195	23
Exactly 62½c	3	3,602	115
Over 62½c	.....	.....	.....
	58	53,531	5,389
BUFFALO DISTRICT—BASE RATES			
55c and under	4	1,412	171
Over 55c but under 59½c	.....	.....	.....
Exactly 59½c	4	8,611	715
Exactly 60c	1	856	96
Over 60c	.....	.....	.....
	9	10,879	982
JOHNSTOWN DISTRICT—BASE RATES			
Under 58½c	.....	.....	.....
Exactly 58½c	2	8,886	603
Over 58½c	.....	.....	.....
	2	8,886	603

"Johnstown District", as so employed, comprises the County of Cambria and the City of Altoona, Pennsylvania.

Such Districts substantially correspond to the Code districts recognized for minimum wage purposes by the Code of Fair Competition for the Iron and Steel Industry (as amended May 30, 1934).

WESTERN DISTRICT—BASE RATES			
Under 56½c	6	4,909	817
Exactly 56½c	1	53	23
Exactly 57c	.....	.....	.....
Over 57c but under 62½c	3	973	[illegible]
Exactly 62½c	91	149,319	10,5[illegible]
Over 62½c	1	501	43
	102	155,755	11,483

The "consistent result" obtained in the Determination of establishing a uniform wage for the Thirteen State Area was sought to be justified *solely* on the ground that it "would seem" that a single eastern market area was predominantly served by the iron and steel plants in the Thirteen State Area (R. 250, 315),—a justification which would convert the Act into one authorizing the fixing of equal wages for persons employed by manufacturers (wherever located) who market their products in the same area, as distinguished from one authorizing the ascertainment of prevailing minimum wages in localities in which goods are produced (R. 315).

The Acting Secretary's conclusion (denied in the Complaint—R. 315) that a single eastern market area was predominantly served by plants in the Thirteen State Area was apparently based upon, and the only factor referred to in the Determination to justify the selection of such Area as a single "locality" was, a statement in a report allegedly made to an annual meeting of the stockholders of the United States Steel Corporation (R. 31, 246). No such report was introduced in evidence at the hearing before the Public Contracts Board (R. 31).

Thus, even if, as contended by the Secretary of Labor, the Act be construed to confer authority upon her, in cases in which the relevant economic facts make such a determination necessary or appropriate to carry out the purposes of the Act, to establish uniform minimum wages in an area as large as the Thirteen State Area, the only "economic factor", or indeed the only fact, considered in selecting the so-called "locality" consisting of the Thirteen State Area was completely irrelevant to the purposes of the Act and was, moreover, based on matter not properly before the Acting Secretary.

No findings of "economic facts" were made with respect to, nor was consideration given to, proximity to source of supply, freight rate differentials, caliber of labor, living costs, or any of the other factors affecting wage rates, cost of production or ability to continue to market after the Determination, of the various plants in the various communities (or, indeed, regions [37]) in the great Thirteen State Area. On the contrary, the Labor Department sought no evidence on any of these points (R. 214).

The Determination was, therefore, devoid of even a plausible economic justification for the Act-

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[37] The closest approach to such a finding was the statements of the minority of the Board (R. 214-215) that the Board did not have before it any evidence that the wage rates paid by plants in the Eastern District conferred any competitive advantage in bidding on Government contracts; and that "the forcible merging of the eastern with the western section [of the Thirteen State Area] would introduce a reallocation * * * with the effect that an unearned and gratuitous advantage would be given to one area at the expense of the other."

ing Secretary's excursion beyond his lawful authority.

5. The institution of suit.

Prior to the institution of suit respondents requested a further postponement of the effective date of the Determination, but by February 25, 1939 (the date of suit), petitioners Perkins and McLaughlin had not granted the request, and were threatening to make the Determination effective on March 1, 1939 (R. 25). Together with petitioner Walling, they were threatening to require that there be included in every contract within the scope of the Determination [38] which should be entered into after that date (whether or not let pursuant to invitations for bids issued prior to said date [39]), a stipulation requiring payment of the minimum wages prescribed in the Determination (R. 32). Petitioner Perkins had also adopted regulations requiring that every invitation to bid

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[38] That is, every Government contract for products covered by the Determination of a value in excess of $10,000.

[39] This was covered by specific ruling (R. 34). The Complaint alleges (R. 34) that such ruling was not only contrary to the provisions of the Act (Sec. 11) but also contrary to the first paragraph of Article 1101 of the Regulations (No. 504) under the Act, which provides as follows:

> "Art. 1101. (Minimum Wages).—Until a determination of the prevailing minimum wage for a particular industry or group of industries has been made by the Secretary of Labor *prior to the invitation for bids*, the stipulation with respect to wages in section 1(*b*) of the Act will be inoperative, as provided in article 1 (*b*) of these Regulations." [Italics ours.]

on any such contract (and, consequently, every bid thereon) should contain a stipulation binding the bidder to comply with the Determination (Reg. 504, Arts. 1, 1101, Appendix II, pp. 8, 16).

Petitioner Perkins had also adopted a Regulation (No. 504, Art. 1101), providing, in so far as here material, as follows:

> "Determinations of prevailing minimum wages or changes therein will be published in the Federal Register and sent to contracting officers through circular letters of the Procurement Division of the Treasury.",

and had directed and instructed petitioner Peoples, Director of Procurement, to direct every agency of the United States desiring to enter into any such contract after March 1, 1939, to include such a stipulation in such contract and the invitations to bid therefor (R. 32, 33).

Petitioner Peoples, Director of Procurement (R. 10), acting pursuant to the direction of petitioners Perkins, McLaughlin and Walling, had directed and threatened to continue to direct every agency of the United States to include such a stipulation in every such contract and the invitations to bid thereon (R. 32, 34).

The other petitioners, chief contracting officers, and their subordinates, had signified their intent to carry out all such regulations and directions (R. 35). Invitations to bid on Navy contracts already published, and on which respondents desired to bid, contained requirements for such stipulations (R. 33-34, 316).

Accordingly, respondents, who, with one exception,[40] had been selling iron and steel products to

[40] The Atlantic Wire Company.

Government agencies for many years (R. 4-8, 313), filed their complaint (R. 2-45; Exhibits, R. 45-257) on February 25, 1939. Amendments to the complaint, subsequently filed by leave of court (R. 306), are set forth at R. 313-318.

The Complaint sought judgment (R. 42-44) enjoining petitioners from enforcing the Determination as aforesaid, ordering petitioners Perkins, Walling and McLaughlin to set aside and withdraw the Determination, and declaring the Determination to be unauthorized by law and invalid.

6. The gravamen of the Complaint.

The gravamen of the Complaint is that respondents' lawful right to bid and negotiate for Government contracts free of limitations or conditions other than those imposed or authorized by Congress is unlawfully invaded and interfered with and threatened with further unlawful invasion and interference by the illegal action taken and threatened by petitioners as aforesaid (R. 36).

As indicative of the long continued and substantial character of the business carried on with the Government by respondents through exercise of that right prior to the Determination and as evidentiary of the likelihood of continued business in the future in the absence of unlawful interference by petitioners,[41] it was alleged, *inter alia*, that the tonnage of the products furnished to Government

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[41] Bulletins No. 126 to 176 of the Division of Public Contracts of the Department of Labor show that more than $1,900,000 aggregate amount of contracts subject to the Public Contracts Act have been awarded for iron and steel products to the respondents since March 27, 1939, the date of the issuance of the preliminary injunction in this case.

agencies by one respondent during the past ten years had average about eight per cent. of its total tonnage and that only during short periods of time during the past twenty years had it been without a Government contract in progress (R. 6-7); that three of the other respondents had had Government contracts during the last two years of a value averaging, in the case of each, well over $125,000 per annum (R. 4, 5, 7); and that two of the respondents were then engaged in the performance of Government contracts of a value over $300,000 (R. 4, 5).

Petitioners' illegal interference with that right was of the most serious nature. Complete destruction of the business relations between respondents and their customer was threatened. The complaint shows that if respondents were required to bid on the basis of compliance with the illegal wage conditions prescribed in the Determination, which would raise respondents' wages between 10% and 19%,[42] they would be in grave danger of being underbid and driven out of competition for Government contracts by large fully integrated companies enjoying more favorable geographic locations[43] (in the West and South) whose wage rates

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[42] In this connection, it is to be borne in mind that, as stated in the Complaint (R. 37), and as recognized in the Report (R. 60-61), an increase in the minimum wages paid by respondents to common laborers employed in the performance of Government contracts would necessitate a corresponding increase for all classes of wage earners employed therein, since rates of pay for such other wage earners are ascertained by adding various differentials to common labor base rates.

[43] From the standpoint of proximity to raw materials, proximity to markets and freight rate differentials (R. 38).

were not increased by the Determination (R. 37-38; 171-173; 162).[44]

The impact of such unlawful interference was immediate. The Complaint specifically describes certain proposed contracts, covered by the Determination, and generally describes others, some to be awarded within two weeks, others within the near future, by Federal agencies (including those headed by the contracting officers who are petitioners herein), and on which respondents desired to bid, and would bid, if the Determination should not become effective, at prices deemed high enough to enable them to realize profits (R. 33-34, 316-317).

The Complaint alleged that between March 1, 1939, and March 9, 1939, bids theretofore invited on contracts for the manufacture of iron and steel products for very substantial amounts were scheduled to be opened by the Navy Department, with a view to awarding contracts thereon; that the invitations for bids on such contracts required that such bids contain stipulations for compliance with the Determination; that respondents Lukens Steel Company (hereinafter called Lukens), Alan Wood Steel Company (hereinafter called Alan Wood) and Central Iron & Steel Company (hereinafter called Central) desired to bid, and, if the Determination should not become effective, would bid, on one of such contracts (Schedule 5681)[45]; that some or all of the respondents desired to, and, if the Determination should not be-

[44] For further proof in the record of such allegation see R. 265, 272, 274, 277, 278, 280.

[45] The affidavits in the record which were filed in support of the allegations in the Complaint show that on March 2, 1939, the bids on such contracts, Schedule No. 5681, covering approximately 7,357 tons of steel plates,

come effective, would, submit bids on some or all of the other contracts referred to; and that all bids submitted would be at prices deemed high enough by the respective bidders to enable them to realize profits on any contracts awarded to them (R. 33-34, 316).

The Complaint further alleged that invitations to bid on numerous large and important contracts for the purchase of iron and steel products by the Navy Department, the War Department, the Treasury Department, the Department of the Interior, the Post Office Department and other agencies of the United States, would be issued, and such contracts awarded, within the immediate future (R. 316-317). It was also alleged that respondents were desirous of bidding on such contracts, and respectively intended, if the Determination should not become effective, to bid on various of such contracts pertaining to products manufactured by them, respectively, at prices deemed high enough to enable them to realize profits on contracts awarded to them (R. 317).[46]

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sheet and strip, were opened. Carnegie-Illinois Steel Company, a subsidiary of United States Steel Corporation (R. 150), submitted the lowest of only three bids, and was awarded the contract. One of such three bids was made subject to the condition that the Determination should not apply to any contract awarded to the bidder (R. 332). Consequently, only two bids received consideration. The estimated value of said contract was $350,000. Central, Alan Wood and Lukens would have bid upon said Schedule No. 5681 had the temporary relief prayed in the Complaint been granted, and the bid which Central had prepared and would have submitted would have been lower than that of the bidder to which the contract was awarded (R. 297-301).

[46] In support of such allegations, the affidavits set forth in the Record show that bids on three of such contracts had been opened by March 15, 1939, and that three of the respondents had been prevented from bidding on such

Respondents had no remedy, other than that which they chose, which was plain, adequate or complete. (R. 36-38). They were advised by their counsel that if they should bid upon, and enter into, any of the contracts referred to above, containing a stipulation for compliance with the Determination, they would be in danger of being estopped to secure a judicial decision as to the invalidity of the Determination (R. 37). Moreover, the penalties provided in the Act (Sections 2 and 3) for non-compliance with any such stipulation (including "liquidated damages", contract cancellation and blacklisting from Government business for 3 years) presented such hazards as to deter them from failing to comply with the unlawful Determination in order to test its validity (R. 37).

7. The decisions of the courts below.

The judgment of the District Court (R. 319-320), rendered without opinion on March 14, 1939, dismissed the Complaint, dissolved a temporary restraining order theretofore issued, and refused to rule on and grant respondents' motion for a preliminary injunction (R. 259-262).

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contracts only because of the refusal of the District Court to grant the temporary relief prayed in the Complaint (R. 298, 299, 303, 306). The impact of the Determination and its enforcement upon respondents is further illustrated by an exchange of telegrams between the Reclamation Bureau of the Department of the Interior and Alan Wood (R. 304-305). From such exchange it is plainly inferable that, by reason of its refusal to comply with the Determination, Alan Wood lost the award on a proposed contract, No. 33119-A Schedule 1, of the Reclamation Bureau, *on which bids were opened February 6, 1939*, notwithstanding the fact that bids on such contracts were invited, submitted and opened almost a month before the Determination became effective.

On March 17, 1939, respondents lodged their record on appeal and, pending printing, filed in the Court of Appeals an original petition for an injunction pending appeal (R. 337-355). After argument on March 22, 1939, before its entire membership (R. 371-372), that court on March 27, 1939, issued its order (R. 372) enjoining the petitioners herein, "until the further order of the Court, from continuing in effect the Determination".

The appeal proper [47] was argued on April 4, 1939, before Justices Miller, Vinson and Edgerton (R. 385-386). On August 4, 1939, in a *per curiam* order and opinion in the appellate proceeding (R. 387-388); the court continued in effect the injunction previously granted,[48] announced the decision of its majority that the complaint stated a cause of action for an injunction as prayed, and stated that, upon filing of majority and minority opinions, the appropriate judgment would be entered.

On October 3, 1939, the opinions (R. 388-410) were filed, and judgment (R. 410) was entered reversing the judgment of the District Court and remanding the case with instructions to proceed in accordance with the opinion of the Court of Appeals.

Petitioners urge that various errors were committed in entering said judgment (Br., p. 11). No error in the issuance of the above-mentioned injunction is assigned, however.

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[47] Together with petitioners' motion to reargue the granting of the preliminary injunction or to clarify the injunction granted (R. 373-378).

[48] Such injunction is still in effect, and the order continuing it, of course, disposed of petitioners' motion referred to in the preceding note. *Cf.* Br., p. 11.

ARGUMENT

PART ONE—THE INVALIDITY OF THE WAGE DETERMINATION

I

The primary question presented is a pure question of law, viz., the proper construction of the term "locality", as employed in Section 1(b) of the Walsh-Healey Act, which term delimits the jurisdiction or authority of the Secretary of Labor under the Act and to which petitioners either assign no meaning or, at most, a meaningless definition designed to permit the Secretary to determine her own jurisdiction, to cloak a usurpation of the power to fix wages and to obtain the same results as those obtained under a construction of the Act, now abandoned and concededly improper, which openly read the term out of the statute.

A. The authority of the Secretary under the Act is limited to the factual determination of minimum wages which prevail in "localities", and is conferred only to the end that each person seeking or contracting to supply goods to the Government may be required to agree to pay a minimum wage prevailing in the locality in which he is to manufacture or furnish such goods under his contract.

As pointed out in the Statement, Section 1 (b) of the Act requires that each Government supply contractor must agree, in any contract for the manufacture or furnishing of supplies in an amount exceeding $10,000, that he will pay his employees engaged in the performance of the contract

"not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the *locality* in which he * * * supplies * * * are to be manufactured or furnished under said contract * * *." [Italics ours.]

As also pointed out, such requirement applies only to "contracts relating to such industries as have been the subject matter of a [wage] determination by the Secretary of Labor" (§11). It is undisputed that the intent of this latter provision is that only contracts let pursuant to invitations for bids issued after the effective date of any such determination shall be affected thereby (Regs. 504, Art. 1101).

The statute thus plainly contemplates that the Secretary of Labor, in due course and in such sequence as may be deemed proper, shall make determinations [1], in accordance with the statute, of the minimum wages to be paid, respectively, by those members of the respective industries who shall manufacture for, or furnish to, the Government the several classes of supplies purchased by it; each determination to cover contracts thereafter to be bid upon and let to any members of the industry or industries which manufacture or furnish a specified class or classes of supplies. The command of the statute as to the minimum wages to be so determined is equally clear.

[1] And, from time to time, such redeterminations as may be necessary to keep the original determinations reasonably current. The Secretary has not made any redeterminations to this date.

The only minimum wages which any person obtaining a contract must agree to pay pursuant thereto are those which prevail, for persons employed as stated in Section 1 (b), in the locality in which he is to manufacture or furnish the particular supplies. Consequently, the wage determination covering all contracts thereafter to be bid upon and let for the manufacture or furnishing of supplies of that class, must determine the minimum wages prevailing for persons so employed in each of the localities in which supplies of that class are manufactured or furnished, viz.: the minimum wages prevailing for persons employed in the locality either

(1) on similar work; or
(2) in the particular industry (i. e., the industry manufacturing or furnishing the class or classes of supplies in question); or
(3) in similar industries; or
(4) in the particular group of industries (i. e., in the group of industries manufacturing or furnishing the class or classes of supplies in question); or
(5) in a similar group of industries.

The Secretary is thus authorized to use any one of a number of statistical bases for each such locality in making her factual determination of the minimum wages which the several variously situated prospective contractors for a given class of supplies must respectively agree to pay; but in each case the minimum wages so determined and applicable to any contractor, and so required to be paid by him, must be minimum wages which in fact prevail in the locality in which he is to

manufacture or furnish such supplies under his contract.

The Secretary has no jurisdiction, for instance, to determine minimum wages prevailing on the continent of North America; nor is authority conferred to determine such wages prevailing in the United States, or in any "regions" or other "broad geographical areas" thereof. She must determine such wages only in "localities", to the end that each person seeking or contracting to supply goods to the Government shall agree to pay a minimum wage prevailing in the locality in which he is to manufacture or furnish such goods under his contract. The Secretary's jurisdiction or authority is, therefore, bounded by the meaning of the word "locality", as employed in the statute.

The proper construction of that term,—a question of law to be determined by this Court,[2]—thus stands at the threshold of any consideration of the validity of the Determination.

B. Petitioners in their brief assign no meaning to the term "locality". They apparently abandon even the meaningless definitions heretofore advanced as a cloak to cover a clear usurpation of power, and the effect of their present position is to read the term out of the statute entirely.

[2] Petitioners seem to suggest that the Secretary has a power or discretion to determine her jurisdiction (i. e., to determine the proper construction of the term "locality") which binds the courts to accept her conception thereof, unless arbitrary or capricious. (See Br., pp. 134-139.) This suggestion is altogether without merit. (See pp. 228-238, *infra*.) But even if it were correct, it would be of no avail to petitioners herein, since, as hereinafter shown, and as held by the court below, the acting Secretary's construction of the Act was palpably wrong.

For reasons which are obvious enough, petitioners have displayed a reluctance to set forth in their brief any clear cut statement of the meaning (or lack of meaning) which they assign to the word "locality". Notwithstanding their protests that the statute has received a consistent administrative construction (Br., pp. 128-132),[4] their rather emphatic criticisms of the construction of the court below,[5] and their repeated arguments as to what "locality" does *not* mean, their brief nowhere attempts to define this pivotal term. The closest approaches to any such definition are the statements appearing at pages 116 and 117 of their brief that

> "the language should be construed so as to authorize the designation of 'localities' of any dimensions appropriate under particular circumstances in the administration of the Act"; and
>
> "the 'locality in which the materials * * * are to be manufactured * * *' is *prima facie* as broad as the area within which all of the possible bidders [on a contract] are located."

In the Determination, the Acting Secretary took the position that a "locality" was any area, however large, which the Secretary might select in the light of economic facts pertaining to a particular industry, for the purpose of determining prevailing minimum wages therein.[6] The court

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[4] See p. 10, *supra*.

[5] See e.g. Br., pp. 104, 131.

[6] The Acting Secretary stated that the Act must be construed to "permit the Secretary to exercise a sound discretion in the selection of appropriate units for prevailing minimum wage determinations" (R. 244) after "considering the economic facts of the [particular] industry itself" (R. 246).

below was advised that "the word 'locality' used in Section 1 (b) means an area to be determined by the Secretary as a matter of discretion and upon consideration of *various* factors in the the particular industry for which the determination is made" [7]. In the petition for certiorari, petitioners stated (p. 15) that "the word means an area of small or large extent according to the economic facts of the particular industry". All such "definitions" are meaningless and are mere cloaks to cover the usurpation of a power to fix wages (either in the entire United States or over broad geographical regions),—a power which Congress definitely refused to grant to the Secretary (see pp. 97-101, *infra*).

Petitioners' present reluctance to define the term is quite understandable, because, in fact, they do not assign any meaning to it, although naturally they do not desire to say so.

Without expressly saying so, they read the word "locality" out of the statute even more effectually than the Secretary did in her earlier determinations under a "construction" of the statute now conceded to be improper, but under which she obtained results that petitioners now claim are "consistent" with those sought in the Determination before the Court. (See pp. 10-11, *supra;* pp. 113-117, *infra*). In those determinations as in this the Secretary claimed the power in her discretion to establish for any industry a uniform minimum wage throughout the United States, or any portion thereof (see Br., pp. 121, 150); and it is on this basis alone that she seeks to justify the Determination.

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[7] See Brief of Appellees below, p. 14.

Consequently, although petitioners carefully avoid definition of the term which delimits the Secretary's authority under the statute, there is no mystery about their real position. To them "locality", as therein employed, is so indefinite as to be meaningless; it comprehends anything from a hamlet to the entire United States; and the Secretary is to give it such application in making wage determinations as, in the exercise of her discretion, she may from time to time deem proper.

Nor is there any mystery concerning the following:

(1) Such view, if accepted, will give to the Secretary the power, for the purposes of the statute, to fix for hundreds of communities, and, indeed, for great regions and sections of the country, minimum wages never theretofore prevailing in *any* industry therein; such wages to be fixed in her uncontrolled discretion, except that she may not establish for any such industry a minimum wage higher than that which she finds to be most usual, in the United States or in any selected portion thereof including such communities, regions or sections, for those employed *either* (a) on similar work, or (b) in the particular industry, or (c) in similar industries, or (d) in the particular group of industries, or (e) in a similar group of industries.

(2) Such view, if adopted, will give to the Secretary the power to fix for an industry located in one section of the country, a wage not paid by any one therein, merely because that wage is paid in another industry located in an entirely different section.

(3) Such view, if sustained, will virtually con-

stitute the Secretary of Labor an industrial dictator with power to drive out of competition for the Government contracts affected all except the favored group which can conform to her notions as to proper minimum wages.

(4) The fundamental premise underlying such view is that it was the Congressional purpose (in enacting a statute requiring contractors to agree to pay minimum wages prevailing in the localities in which they are to do their work) to require all who may compete for the same Government contract to pay the same minimum wage. As we shall hereinafter show, nothing could be farther from the purpose of Congress in enacting the statute.

The statutory basis for this enormous grant of power is sought to be found solely in the asserted indefiniteness of a word, the common meaning of which is generally understood by every school boy and was clearly recognized by the Public Contracts Board in the Report. (See pp. 7-8, *supra.*)

C. The meaning assigned to the term by the court below is clearly correct.

The court below found no such indefiniteness in the term "locality". While recognizing that the term does not precisely mark out the boundaries of a particular territorial unit for purposes of exact measurement in terms of acres or square miles (R. 390), it also pointed out that the term is definite, within limits generally understood and "long and well known to those acquainted with the American tradition" (R. 390, 393).

It held, that as employed in the statute, the word plainly denotes a "*local center* of manufacture", "community", or similarly described small geo-

graphical area (R. 392, 395, 390). It so held on the ground that such was the meaning accorded to the term by popular acceptance and usage (R. 390-393) and compelled by the context and obvious purpose of the statute (R. 392, 394). The court further pointed out that such meaning was confirmed by the legislative history of the Act, including statements of those sponsoring and in charge of the legislation to the effect that the purpose of its wage provisions was to authorize the Secretary to ascertain prevailing minimum wages in "communities", but not to fix wages (R. 395).

We submit that the decision of the court below is clearly correct, whether considered from the standpoint of the commonly-accepted usage of the term "locality", the context in which it is employed in the Act, or the legislative history and purpose of the Act.

II

The Determination was palpably beyond the authority of the Secretary of Labor, since the term "locality", as employed in the Act, plainly means a "local center of manufacture", "community", or similarly described small geographical area surrounding the place of performance of a Government contract.

A. In common usage the term "locality" is synonymous with such terms as "place", "vicinity", "neighborhood", "district", "community", "city" and "county", and describes an area or place local in nature.

There is probably no rule of statutory construction more firmly established by the decisions of this Court[1] than that the Congress, in enacting a statute, presumptively uses the language employed therein in its usual significance and in accordance with common understanding. Accordingly, the first inquiry of the court below was as to the commonly accepted meaning of the term "locality". Its conclusion was that that term, frequently used by many Americans, is not commonly employed to describe either the entire United States or a large geographical area, with widely diverse interests, such as the Thirteen State Area, but, on the contrary, is commonly used synonymously with such terms as "place", "vicinity", "neighborhood", and "community" and to describe a small geographical area (R. 390-393).

Such conclusion is assailed by petitioners as

[1] *Federal Housing Administration* v. *Burr*,.....U. S....., 60 Sup. Ct. 488, 491.; *City of Lincoln, Neb.*, v. *Ricketts*, 297 U. S. 373, 376.

unreasonable (Br., p. 99-100), although the attack is delivered under guise of argument that the word "locality" has no such "intrinsic" meaning,—whatever that may mean,—as to exclude the geographic units established by the Determination (*ibid*, pp. 93 et seq.). The very fact that petitioners are impelled to make such an argument is indicative of the weakness of their case.

Petitioners refer to dictionary definitions (Br., p. 100); accordingly, for the convenience of the Court, we set forth in Appendix VII a collection of such definitions. But neither the members of this Court, nor any other American, need consult a dictionary to know that the term "locality", in common usage, means what the court below said it meant, and does not mean the entire United States or an area such as the Thirteen State Area.

"Locality" and its derivatives are among the most common words in American speech and tradition. The opinion of the court below (R. 390-391) collects many of the more familiar expressions embodying them and many judicial decisions with respect thereto. To avoid unnecessary repetition thereof, we respectfully refer this Court to such passages in the opinion of the court below.

Because of the frequency of its employment in our daily life, further illustrations, almost without number, which show the commonly accepted usage of the term "locality", might be cumulated. We confine ourselves to a few, each of which we believe to be highly pertinent.

1. Correct usage of the term "locality", and the palpable misuse thereof by the Acting Secretary in the Determination, are vividly illustrated by the Report of the Public Contracts Board in this very matter.

As pointed out in the Statement (p. 7, *supra*) the Public Contracts Board in its Report proceeded on the erroneous theory that the function of the Secretary of Labor under the Act was not limited to the ascertainment of prevailing minimum wages in "localities". Consequently, it made no effort to ascertain prevailing minimum wages in "localities" and freely employed the term "locality" and the term "region" in accordance with ordinarily accepted usage. In so doing, however, it brought into bold relief the patent subterfuge resorted to in the Determination.

Thus, the Board said (R. 159):

> "In view of the evidence which shows that across the South for a distance of some 2,000 miles from East to West the minimum wages in the industry are uniformly low, * * * we believe that this *region* should be taken separately for the purpose of finding a prevailing minimum wage.
>
> "The Southern *region* as we have defined its limits here covers a very large territory. * * * *" (Italics ours.)

That the "region" thus found by the Board as an appropriate geographical area within which to determine prevailing minimum wages did not constitute a "locality" and could not properly be called a "locality" was plainly recognized by the Board in many passages of the Report, including the following (R. 160):

> "The principal difficulty with the Code wage districts as a means of outlining *regional* boundaries which might be set up in these proceedings is that the Code districts were not drawn up to bring out the predominant minimum wage practice of the industry viewed either as a whole or over broad geographical regions. The opposite objective motivated the drawing of the boundaries of the Code wage districts * * *. As it is expressed in the brief of the Andrews Steel Company, under the Code 'basic wage rates were established in the steel industry considering *local* conditions as found in the separate plant locations' * * *." (Italics ours.)

By the mere stroke of the pen, this vast "Southern region" was transformed in the Determination into a mere "locality", *after the addition thereto of most of the State of West Virginia.*

The Board also said (R. 176):

> "While it is apparent that no portion of the wage scale can be assigned exclusively to New England, or east of Pittsburgh, or the Middle West or the West, it is a fact that in a good many *localities* and areas over the breadth of the country one or another of the base rates is paid to more workers than is any of the other rates. * * *" (Italics ours.)

The Board refused to give effect to these wage differentials between the various localities because it did not believe that "relatively small geographical areas should be made the basis for separate findings of prevailing minimum wages which would be limited to the *locale* of the variation"

(R. 180) and stated that the Secretary of Labor had the power to find prevailing minimum wages for both an industry as a whole or in "broad geographical regions" (R. 160). The Board would have been shocked, however, had any one suggested that such "regions" constituted "localities".

As stated by O. R. Strackbein, a member of the Board, in his book entitled "The Prevailing Minimum Wage Standard"[2] at pp. 70-71:

> "The word 'locality' in its general acceptation denotes a limited geographical area. * * *
>
> * * * * * *
>
> "We may conclude that whatever interpretation might be placed on the term 'locality', it could not be expanded to an extent sufficient to incorporate a State, *without usurping a meaning* which could be expressed better by a less controversial term and *without passing beyond its own accepted sense.* Locality is indissolubly associated in its meaning with 'neighborhood' and 'vicinity', and both of these latter terms, although indeterminate in their geographical implications, denote proximity to any given central point." (Italics ours.)

That the Acting Secretary "usurped a meaning," as well as power, in making his Determination, seems incontrovertible.

2. The commonly accepted usage of the term "locality" is further illustrated by the construction it has received when employed in all other Federal prevailing wage statutes, and the definitions thereof which have been given in the various State prevailing wage statutes.

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[2] Graphic Arts Press, Washington, D. C. (1939).

In so far as we have been able to ascertain, the Congress has enacted, all told, seven statutes, including the Walsh-Healey Act, requiring payment to the persons described therein of the prevailing or prevailing minimum wages in designated territorial units:

The first such statute, the Bacon-Davis Act (46 Stat. 1494; 49 Stat. 1011) is set forth in Appendix III, and is hereinafter discussed at some length (see pp. 68-70, *infra*). For present purposes it is sufficient to note that it provides, in substance, for payment by Federal construction contractors of wages prevailing in the city, town, village or other civil subdivision of the State in which their work is to be performed. These territorial units have been described by the Secretary of Labor in her regulations as "localities" (see p. 69, *infra*).

The second such statute was the Emergency Relief Appropriation Act of 1936 (49 Stat. 1608), which appropriated funds for relief projects and provided that the persons engaged thereon should be paid "not less than the prevailing rates of pay for work of a similar nature." That statute was administratively construed to provide for payment of such rates prevailing in "localities", i. e. counties or their immediate vicinities.[3]

The next such statute was the Walsh-Healey Act.

Since the enactment of the latter statute Congress has enacted the Emergency Relief Appropriation Acts of 1937 (50 Stat. 352, 354, § 2) and

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[3] Administrative Order No. 44, dated July 11, 1936, of Works Progress Administration (1 Fed. Reg. 1520).

1938 (52 Stat. 809, 812, § 9), providing that the rates of pay for persons employed on relief projects should be not less than the prevailing rates of pay for work of a similar nature "in the same locality"; and the Acts of September 1, 1937 (50 Stat. 888, 897), creating the United States Housing Authority, and of June 3, 1939 (53 Stat. 807), amending the National Housing Act, each of which provides for the payment of wages "prevailing in the locality" in which the work is to be performed. Pertinent extracts from the four statutes last cited are set forth in Appendix VI.

It is conceded by petitioners (Br., pp. 94-95, note 79) that the term "locality", as employed in the four statutes last cited, "denotes a small geographical area." This is sought to be explained on the ground that such statutes deal with construction work, the site of which is known in advance of bidding on a contract therefor (*ibid.*). The fact is, however, that both of the Emergency Relief Appropriation Acts deal with work of all sorts, including "educational, professional, clerical, cultural, recreational, production, service, * * * and miscellaneous non-construction projects".

We venture to suggest, therefore, that the term "locality", as employed in such statutes, denotes a small geographical area for a reason far less abstruse than that suggested by petitioners. It denotes such an area because such is its denotation in ordinary speech. And its inclusion in a prevailing wage statute emphasizes that it is being used in its commonly accepted sense. (See pp. 50-55, *infra*.)

The foregoing conclusions are confirmed by the

employment and definition of "locality" in various state prevailing wage statutes. Typically, the term is defined as "the town, city, village or other civil subdivision of the state wherein the physical work is being performed" (Laws N. Y., 1927, ch. 563, p. 1340, §1); or "the county wherein the physical work is being performed" (R. S. Kans. 1923, § 44-201; L. 1931, ch. 214, §1); or "the county or municipality in which the work is being done" (Rev. Stat. N. J. 1937, § 34:10-1).[4] Most of such statutes deal only with public construction contracts, but where they also apply to supply contracts,[5] the localities within the state remain constant in size and do not expand into large regions as petitioners seem to think they should under such circumstances.

3. The decision of this Court in *Connally* v. *General Construction Co.*, 269 U. S. 385, supports respondents' contention that the term "locality", as employed in Section 1 (b) of the Act, means a small geographical area.

The *Connally* case, *supra*, involved a suit brought by a contractor to enjoin certain State and county officers of Oklahoma from enforcing an Oklahoma statute making it a crime for any State contractor to pay "less than the current rate of per diem wages in the locality where the work is performed". The defendants had threatened to

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[4] See also Laws Arizona, 1933, ch. 71, § 5; Ohio Code (Throckmorton) § 17-3; Tex. Ann. Stats. (Vernon) Art. 515 9A, § 4; Utah R. S. (Supp. 1939), § 76 B-O-1; West Virginia Code of 1937, Art. 5A § 2357 (1).

[5] Rev. Stat. N. J. 1937, §34:10-1. R. S. Kans. 1923 (1933 Supp.), §44-201; Laws Oregon, 1937, ch. 200, §1

prosecute the plaintiff for failure to pay wages "paid to laborers in the vicinity of Cleveland", Oklahoma, near which town the plaintiff was constructing a bridge. This Court affirmed an interlocutory decree granting a preliminary injunction.

A majority of the Court (per Mr. Justice Sutherland) so held on the ground that the statute did not satisfy the constitutional requirement of the "due process" clause that a statute *imposing criminal penalties* must be specific in its terms, stating that both the phrases "the current rate of per diem wages" and "in the locality" were not sufficiently definite for such purpose.

It is significant, however, that the majority of the Court so held while accepting the correctness, as of course, of the definition of the term "locality" by the highest court of the State, viz., *"place", "near the place", "vicinity", or "neighborhood"*. In so far as the decision of the majority concerned the word "locality", its reasoning was that even the term "neighborhood" would not have been sufficiently specific for a statute imposing criminal penalties.

The elasticity of both terms, so enthusiastically noted by petitioners herein (Br., p. 97), was said to be one which might "be equally satisfied *by areas measured by rods or miles*" (p. 395). Even this slight elasticity was held to be too great for a penal statute, since "two men, moving in any direction from the place of operations, would not be at all likely to agree upon the *point* where they had passed the boundary which separated the locality of that work from the next locality" (p. 394). But, said the majority (at p. 395): "In other connections or under other conditions the term 'locality' might be definite enough * * *."

The concurring opinion of Mr. Justice Holmes and Mr. Justice Brandeis is likewise of great significance. They concurred in the decision on the narrow ground that "the plaintiff was not violating the statute by any criterion available in the vicinity of Cleveland" (at p. 396). Their view must, therefore, have been that the term "locality", as employed in the statute, plainly denoted a town and its vicinity, and either (a) that this was a warning to those subject to the statute sufficiently definite to permit the imposition of criminal sanctions; or (b) that such constitutional question was one too close to be decided if the case could be disposed of on the assumption that the statute was thus sufficiently definite.

Whatever the disparity of views of the members of the Court on the narrow issue presented in the *Connally* case, the entire Court seems to have been in agreement on the basic proposition of interest herein, namely, that a "locality" is a small geographical area.

B. The context in which the term "locality" is employed in the Act confirms that it is used in its ordinarily accepted sense to describe the place, or a narrowly restricted area surrounding the place, where supplies are to be manufactured or furnished under a contract, i. e., a local center of manufacture or community.

Petitioners argue strenuously (Br., p. 104) that in order to ascertain the meaning of the term "locality", as employed in the Act, the context in which it is used must be considered. It is signifi-

cant, however, that they devote little, if any, attention to the context. On the contrary, after making the above statement, they immediately pass to an argument as to the alleged purposes and objects of the legislation, which is predicated not on the language of the statute itself, but upon alleged extrinsic aids, including reports by various Massachusetts commissions rendered years after the passage of the Act. (Br., pp. 110-112).

At a later point we will consider in some detail the legislative history of the Act and show that it confirms what we believe plainly appears on the face of the statute (see pp. 63-112, *infra*). At this time, however, we accept petitioners' challenge to consider the context in which the term "locality" is employed in the statute.

Upon such consideration, the conclusion is irresistible that such term,—which even petitioners concede "is *often* used to denote a small geographical unit" (Br., p. 94),— is unquestionably so employed in the statute and thus means what the court below said it meant, after considering the context (R. 392, 394). Upon such consideration, it likewise appears that the purposes of the wage provisions of the Act were, by requiring the contractors affected to pay the minimum wages prevailing in their respective communities, (a) to avoid placing the Government in the position of inducing wage cutting or otherwise disturbing local wage standards, (b) to avoid placing the Government in the position of dealing with those paying sweatshop wages not conforming to the standards of their communities, and (c) to encourage employers conforming to such community wage standards.

1. The fact that the term "locality" is used in the statute to designate the unit of determination of a "prevailing" wage confirms that it is employed in its commonly accepted sense.

The authority conferred by the Act upon the Secretary of Labor is that of determining "*prevailing* minimum wages" in "localities". The fact that the Secretary is thus limited to the factual ascertainment of *prevailing* wages affords, in and of itself, overwhelming confirmation that the Congress, in designating the "locality" as the unit for wage determination, employed that term in its commonly accepted sense.

Analysis of the experience of this country in the field of wage regulation shows that the wage statutes which have been enacted may be generally classified into three groups:

(a) Statutes, such as the Fair Labor Standards Act of 1938,[6] in which the legislature itself fixes a minimum wage.

(b) Statutes providing for wage fixing by the executive in the light of the standards provided therein. Such statutes authorize the imposition of a wage, in the exercise of a reasonably limited administrative discretion, after investigation and consideration of various factors bearing on the reasonableness or fairness of the particular wage, such as the nature and value of the services rendered, the health of the wage earners involved, the ability of employers to pay the wage, etc.

(c) Prevailing wage statutes. Such statutes require payment, not of a wage fixed and imposed by the executive after investigation and considera-

[6] 52 Stat. 1060.

tion of its fairness and reasonableness, but of a wage which is already existing and is assumed to be fair and reasonable because it has been accepted by, and represents the judgment (rendered in the light of the particular circumstances) of, the majority in the community in which it is paid. To the extent that executive action is resorted to for the purpose of implementing such statutes, the power conferred is that of ascertaining an existing fact, viz: the prevailing wage in question.

Two considerations with respect to such prevailing wage statutes are of vital significance here. In the first place, the unit for wage determination thereunder is invariably a small geographical area; in the second place, the statutes are customarily, if not invariably, limited in their application to public work, or work financed directly or indirectly with public funds.[7]

Use of a large geographical area as a unit for determination of a prevailing wage would run counter to the entire philosophy underlying the prevailing wage statutes. As indicated above, the underlying concept of requiring payment of a prevailing wage is that the wage rates which prevail in a given local area are in general those which experience has demonstrated are fair and reasonable considering the conditions which obtain in that area and which are accepted as such by most employees and employers in that area. It is elementary, however, that local conditions now have, and always have had, a controlling effect on the

[7] We have not found any prevailing wage statute which is not so limited in its application.

wages which can be paid, and which in fairness should be paid, in any given place.[8] Costs of living, efficiency of labor, costs of production, and a host of other conditions, vary widely as between different communities. Consequently, as soon as one departs from the local community as the wage unit one also parts company with the basic concept of the prevailing wage standard.

It is not coincidence, therefore, that every other Federal statute which has employed the prevailing wage standard concededly contemplated wage determinations in small territorial units (see pp. 44-45, *supra*). In this connection, it is most significant that the only such statute which did not so *expressly* provide was, nevertheless, administratively so construed, in accordance with what was undoubtedly the Congressional intent.[9] It is also

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[8] An interesting illustration of this fact is to be found in Executive Order No. 7076 dated May 20, 1935, under the Emergency Relief Appropriation Act of 1935, in which the President in prescribing schedules of monthly earnings of workers on projects covered thereby prescribed different amounts which varied by counties according to the population of the largest municipality therein and the region in which they were located and made certain exceptions in the event "that local circumstances warrant a different rate of earnings." It is also interesting to note that, although the Emergency Relief Appropriation Act of 1935 did not provide for payment of prevailing wages, the hourly wages (as distinguished from the monthly earnings) paid thereunder were fixed on the basis of the prevailing wages in the locality of payment. (See O. R. Strackbein, The Prevailing Minimum Wage Standard (1939), p. 16-17.)

[9] See p. 44, *supra*. The statute in question, the Emergency Relief Appropriation Act of 1936, was plainly intended to authorize the continuance of the practice under the Emergency Relief Appropriation Act of 1935, discussed in Note 8, *supra*. This is borne out by the fact that the Emergency Relief Appropriation Acts of 1937 and

of the greatest significance that neither our research nor that of petitioners has produced a single State prevailing wage statute providing a unit for wage determination consisting of more than a territorial fraction of the State. With unfailing consistency, such statutes designate as units for wage determination either political subdivisions, their vicinities, or "localities", generally defined as indicated above.[10]

In substance, therefore, if one is to be guided by either the legislative experience in this country or the basic concept underlying the prevailing wage standard, one necessarily thinks of prevailing wage determinations in terms of small territorial units. It was in such terms that Congress thought in enacting the Walsh-Healey Act.

Mention has already been made of the fact that

1938 in terms provided for payment of not less than the prevailing rates of pay for work of a similar nature "in the same locality."

[10] *Rev. Code Ariz. Anno.* (1936 Supp.) §2755b; *Labor Code Calif.* (1937) §§1771, 1724; *Colo. Stats. Anno.* (1935) Ch. 97, §257; *Conn. Gen. Stats.* (1939 Supp.) §793e; *Rev. Code Del.* (1935) §3643; *Comp. L. Fla.* (Perm. Supp. 1936) §1365(5); *Idaho Laws*, 1939 Ch. 33; *Illinois Laws*, 1939, p. 563; *Baldwin's Ind. Stats.* (1935 Supp.) §10039-1; *Gen. Stats. Kans. Anno.* (1935) §44-201; *Carroll's Ky. Stats.* (1936 Rev.) §4329; *Code Pub. Loc. Laws Md.* (1930) Art. 4, §516; *Anno L. Mass* (1938 Supp.) Ch. 149, §26; *Rev. Codes Mont.* (1935) §3043.1; *Nevada Laws*, 1939, Ch. 139; *Rev. Stats. N. J.* (1937) §34:10-1; *New Mex. Stats. Anno.* (1938 Supp.) §114A-301; *New York Laws*, 1939, Ch. 832; *Throckmorton's Anno. Ohio Code*, (1936) §§17-3, 17-4; *Harlow's Okla. Stats.* (1931) §10872; *Oregon Laws*, 1937, Ch. 200; *R. I. Gen. Laws* (1938) Ch. 290, §5; *Vernon's Tex. Stats.* (1936) Art. 5159a; *Utah Rev. Stats.* (1939 Supp.) §76B-0-1; *W. Va. Code* (1937) §2357(1); *Wisc. Stats.* (1937) §103.49.

such statutes are customary only in the field of public work. The reason for this is evident. The purposes of such statutes are threefold: first, to avoid placing the Government, Federal, State or local, in the position of dealing with those paying wages below the prevailing standards; second, to avoid placing the Government in the position of inducing wage-cutting or otherwise disturbing local wage standards; and third, to encourage and protect the employer who conforms to the community wage standard, which is presumptively fair and reasonable. Such statutes satisfy all such purposes and, in so doing, avoid the controversial problems and administrative complications incident to executive wage-fixing.

To interpret the Act as suggested by petitioners, i. e., to permit the Secretary to consider either the entire United States, or any broad geographical region thereof, as a locality, would be to fly in the face of the considerations mentioned above. Such interpretation would, moreover, transform the Secretary's function from the fact-finding function, consistently delegated to the administrative arm by prevailing wage statutes, to one of wage-fixing—and wage-fixing without adequate standards to guide her. As stated by the Acting Secretary in the Determination (R. 246), when so construed "the language of the statute does not itself suggest answers to the questions which it raises."

That such interpretation would confer such wage-fixing power is apparent upon the most superficial consideration, as we have already pointed out (*supra*, p. 36). Thus, the Secretary could *impose* in her discretion not only upon indi-

viduals, but upon entire communities, regions and sections, wages believed by *her* to be proper but not in fact *prevailing* in any locality therein, through the simple device of selecting and gerrymandering portions of the country, as she has done in this case.

It is simply preposterous to suggest that the Congress intended such results in enacting a prevailing wage statute, which, following the general practice, designated the "locality" as the unit for wage determination, for the reasons above stated.

2. The fact that the Secretary is authorized by the Act to determine the minimum wages prevailing in each locality for persons employed on "similar work or in the particular or similar industries or groups of industries", likewise confirms that the term "locality" is used in the statute to mean a small geographical area.

We have heretofore noted that the Secretary is authorized to use any one of the several statistical bases permitted by the standard quoted in the heading in making her factual determination of minimum wages for each locality. This makes good sense if a "locality", for purposes of the statute, is a community, in which all employers engaged in similar work face substantially the same economic conditions. It is incredible, however, that the Congress would have so provided had its conception of a "locality" been the entire United States, or any broad region or section thereof in which employers operate under varying circumstances and conditions.

Thus, if, as is plainly the case, a "locality", for purposes of the statute, is a community, the above

mentioned authorization dovetails completely with what we described as the basic concept of the prevailing wage standard, viz. that it is the experience and judgment of the community which gives to a prevailing wage the circumstantial guarantee of fairness. The broader the base utilized in ascertaining the prevailing wages paid to the lowest-paid class of labor by employers engaged in similar work in a given community, the more likely is it that the prevailing wage found will reflect the community's experience and judgment. Conversely, the likelihood of award of a public contract to an employer who operates the only plant of a particular industry in the community, and who pays a sweatshop wage not conforming to the standard of the community for similar work, is correspondingly decreased.

Petitioners' construction of the Act, under which the entire United States, or great sections or regions thereof, are to be considered as "localities", as the Secretary of Labor may choose, would lead to ridiculous results. Thus, both the copper smelter in Montana, operating under one set of conditions and paying one wage, and the copper smelter in Arizona, operating under another set of conditions and paying another wage, could be required to pay a wage differing from that paid by either and from that paid by anyone engaged in similar work in their respective sections of the country, viz. the wage paid by the blast furnace operator in Pittsburgh, or in Birmingham, operating under entirely different conditions. That this example is not an exaggeration is shown by the fact that petitioners claim this very power on behalf of the Secretary in their brief (p. 118).

They state that "these alternative bases were included to enable the Secretary of Labor to meet the situation in which an entire industry * * * is affected with [what the Secretary considers to be] sweatshop wage conditions."

It cannot be supposed that the Congress intended to sanction any such absurd results.

3. To attribute to the term "locality", as employed in the statute, any meaning other than its ordinarily accepted meaning, would raise grave doubts as to the constitutionality of the legislation and run counter to the Congressional purpose, clearly evidenced in the statute as a whole, to withhold from the Secretary any broad, indefinite regulatory power over wages or otherwise.

It is, of course, well settled that an interpretation of a statute giving rise to serious doubts as to its constitutionality should be avoided, if possible.[11] Grave doubts as to the validity of the wage provisions of the Act would arise if the construction contended for by petitioners should be given to the word "locality".[12] The delegation of legislative authority under the statute, so construed, would be so great[13] that, as is conceded in the Determination itself, the language of the statute would not even suggest answers to the questions

[11] *Ann Arbor Railroad Co.* v. *U. S.*, 281 U. S. 658, 669; *United States* v. *Jim Fuey Moy*, 241 U. S. 394, 401.

[12] We have not challenged the constitutionality of the Act. The only point made here is that the unconstitutional interpretation resulting from petitioners' construction should be avoided.

[13] *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; *A. L. A. Schechter Poultry Corp.* v. *U. S.*, 295 U. S. 495.

which would have to be answered in its administration.

Thus, even if the statute were unclear and susceptible of two equally possible interpretations, it would be presumed that the Congress did not intend so to delegate legislative authority to the Secretary. But here there is no necessity to resort to any such presumption. Unless the key word "locality" is deprived of its ordinary and well recognized meaning,—a meaning which, as we have shown, is confirmed and compelled by its immediate context,—the statute is perfectly clear and does not raise questions to which the answer is not suggested.[14] Moreover, the entire statute is, on its face, a concrete expression of a Congressional intent to withhold from the Secretary any broad, indefinite regulatory power over the subjects dealt with therein and to prevent any such questions from arising.

Mere examination of the measure as a whole shows that its regulatory provisions in Section 1 were designed to operate as automatically, definitely, and, indeed, mathematically, as possible.[15]

[14] Any statute could be deprived of its clarity by such a process.

[15] In prohibiting child labor, the Act (§ 1 (d)) definitely specifies the minimum age for employment and requires no antecedent administrative determination of the hazardous or nonhazardous character of the employment. (*Cf.* § 3 (l) of the Fair Labor Standards Act of 1938, 52 Stat. 1060). In outlawing bid brokerage and homework (§ 1(a)) the requirement that the contractor be "a manufacturer of or a regular dealer" in the supplies to be purchased was borrowed from a statute long in effect (R. S. § 3722, 34 U. S. C., § 572) and of well settled meaning. In interdicting other sweatshop working conditions (§ 1 (e)), compliance with State law was made *prima facie* compliance with the statute. In regulating hours, the number of hours of permissible employment per day and per week was specified in terms (§ 1 (c)).

None of such provisions, except that regulating wages, requires administrative implementation; and, in the case of that lone exception, the power conferred on the Secretary of Labor is a fact-finding power.

The sphere for administrative action is thus almost wholly confined, in terms, to the granting of exemptions (§§ 6, 3), inspection and investigation (§ 4), determination of violations (§ 3), and the issuance of regulations conforming to, and necessary to carry out the specific provisions of, the legislation. The *only* substantial discretion vested in the Secretary,—the *only* grant of power to determine questions of policy within the framework of a broad standard,—is that pertaining to exemptions (§§ 6, 3).

Plainly, therefore, the statute reflects a deliberate intent that the Congress itself should specify, with particularity and without administrative aid involving policy formulation or the exercise of broad discretion, the maximum extent to which those subject to the legislation should be regulated and the character of such regulation; and that only in determining whether less than such maximum regulation should be imposed in an appropriate case, should the administrative arm be authorized to perform a policy-making or broadly discretionary function.

Such intent, clearly evidenced by the statute itself, is utterly inconsistent with the interpretation which the Secretary now seeks to place thereon,—an interpretation under which she seeks to arrogate to herself a roving commission to fix wages in her virtually uncontrolled discretion.

4. The fact that the statute contemplates predetermination of wages in advance of bidding upon the contracts affected does not indicate, as petitioners suggest, that a "locality" may be the entire United United States, or any portion thereof, as the Secretary of Labor may from time to time determine.

Petitioners seek to support their construction of the Act by repeated statements which imply or assume that the Secretary of Labor is authorized and required under the Act to determine, in advance of the bidding on any contract within the scope of the Act, the locality in which the supplies called for by such contract are to be manufactured or furnished.[16] (See, e. g., Br., pp. 117, 119, 145.) From that unwarranted premise they reach the conclusion that the Secretary of Labor's determination of minimum wages to be paid in any industry manufacturing or furnishing supplies must establish a uniform wage for any geographical area in which are located plants of members of that industry who in the judgment of the Secretary will be *likely* to bid on the same contract or contracts (*ibid.*).[17]

Both the premise and the conclusion entirely ignore the express provisions of the Act.

Section 1 (b) of the Act requires that the contractor shall agree *in his contract* that those employed by him in the performance of the contract "will be paid * * * not less than the minimum wages as determined by the Secretary of Labor

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[16] No such contention had ever been advanced before during this litigation.

[17] That area they consider to be the locality in which supplies *are* to be manufactured under such contracts.

to be the prevailing minimum wages * * * in the locality in which the * * * supplies * * * are to be manufactured or furnished under said contract".

Section 11 of the Act provides that the provisions of the Act requiring such an agreement on the part of the contractor "shall apply only to * * * contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor".

In other words, the "subject matter" of the wage determination by the Secretary is not the contract or the locality in which the contract is to be performed, but the industry or industries to which the contract relates, viz: the industry or industries members of which manufacture or furnish supplies of the kind which are called for by the contract.

It follows of necessity from the express terms of Section 1 (b) that in the wage determination which the Secretary of Labor shall make for any industry she must determine the minimum wages prevailing in each locality in which the members of that industry manufacture or furnish supplies that are likely to be purchased by the Government. It is equally clear, however, that, in making a wage determination for any industry, the Secretary of Labor is not authorized or required to determine where any Government contract for supplies to be manufactured or furnished by any member of that industry is to be performed.

The procedure established by the Act is that the Secretary shall, in due course and in such sequence as may be deemed proper, determine minimum wages to be paid in the various industries which

shall manufacture or furnish supplies under Government contracts. Until the Secretary shall have determined such minimum wages for any industry, the members of that industry who shall bid for Government contracts are not required to agree to pay any minimum wages. After the Secretary shall have made a wage determination for that industry, each of the members thereof who shall bid for any such contract is required to agree to pay the minimum wages found by the Secretary in such determination to be the prevailing minimum wages in the locality in which the supplies called for by the contract are to be manufactured or furnished by him.

The procedural machinery thus established by the Act accomplishes the double purpose of enabling the bidder to know in advance what minimum wages he will be required to pay if awarded the contract and of giving the Secretary of Labor time to make the required determinations after due investigation and deliberation. That procedure in no way alters or affects, and was plainly not intended to alter or affect, the substantive requirements of Section 1(b) of the Act with regard to the minimum wages which a contractor is required to agree to pay, except that under such procedure a contractor is not required to make any agreement in that regard, if a wage determination relating to his industry is not at the time in effect. With that exception the substantive requirements of Section 1(b) of the Act would be the same, if the Act provided that the prevailing minimum wages in any locality should be determined by the Secretary of Labor only when and as a dispute should arise under the particular con-

tract. Petitioners' attempt to change the substantive requirements of the Act by constantly emphasizing that the procedural machinery established thereby provides for predetermination of minimum wages is palpably unsound.

The procedure established by Congress is thus entirely clear and simple. Congress foresaw and provided against the very dilemma with which petitioners now claim the Secretary of Labor is confronted under the Act, and which they assert requires that she fix uniform minimum wages for geographical areas which will include all localities in which she may think a Government contract to be advertised at some future time is likely to be performed.

The Congress neither authorized the Secretary to indulge, nor imposed on her the duty of indulging, in any such speculation.

It thus becomes apparent not only that petitioners' contentions in this regard ignore the express provisions of the statute, but also that they are advanced for the first time at this late date for the purpose of affording a colorable justification to support petitioners' theory that Congress intended by the wage provisions of the Act to require that all bidders for a Government contract within the scope of the Act should agree to pay the same minimum wages. That theory flies in the face of the express words of the Act and entirely reads out of it the term "locality".

C. The Determination is contrary to the express provisions of the Act and beyond the authority of the Secretary of Labor.

It is submitted that an examination of the

statute itself shows that the term "locality", as employed therein, denotes a "local center of manufacture", "community", or similarly described small geographical area surrounding the place of performance of a Government contract. The Secretary of Labor is, therefore, without authority under the Act to determine prevailing minimum wages in geographical units larger than those comprehended within the limits of such definition. Conversely, in administering the Act, she may determine such wages in any territorial units fairly comprehended by such definition.[18] It is conceded by petitioners,—as it must be,—that the Thirteen State Area and the other broad geographical regions used as territorial bases for wage determination in the Determination do not fall within such limits.

Accordingly, the Determination is patently unlawful and beyond the statutory authority of the Secretary of Labor. There is, therefore, no need to consult the legislative history of the Act; and the court below was correct in so holding (R. 394). But, if recourse is had to the legislative history, the conclusions that our construction of the term "locality" is correct, and that the Determination was completely beyond the Secretary's authority, are emphatically confirmed, as will be shown.

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[18] For instance, as pointed out by the court below, the Secretary might, in the light of the circumstances, determine such wages either in a city, a county or some similar subdivision of a State, or in a metropolitan area or the immediate vicinity of any such civil subdivision, whether or not overlapping political boundaries (R. 392), since all such geographical areas are fairly embraced within the concept of "locality".

III

The legislative history of the Act confirms (A) that the authority of the Secretary of Labor under the act is limited to the ascertainment of prevailing minimum wages in "localities", (B) that the term "locality", as therein employed, means a local center of manufacture, community or similarly described small geographical area, (C) that the Congress deliberately withheld from the Secretary the power either to fix wages in, or to eliminate wage differentials existing between, such localities, and (D) *a fortiori*, that the Congress withheld such powers over the economy of the vast regions in respect of which the Secretary now seeks, in effect, to assert them.

A. The background in the light of which the Walsh-Healey legislation was introduced.

1. R.S., Section 3709.

The Walsh-Healey Act and the determination of the Acting Secretary of Labor challenged herein and which he purported to make under the authority thereof must be considered against the background of Section 3709 of the Revised Statutes (41 U.S.C. § 5), the basic statute regulating the award of public contracts.

Section 3709, known as the "lowest responsible bidder" statute and sometimes so referred to herein, provides that:

> "Except as otherwise provided by law all purchases and contracts for supplies or services, in any of the departments of the Government,

and purchases of Indian supplies, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals." [41 U. S. C § 5]

As uniformly interpreted, such statute requires competitive bidding, after advertisement, on Government contracts (not specifically excepted by law), and the award of such contracts to the lowest responsible bidders.[1]

Consequently, it has long been settled that, unless specifically empowered so to do by another statute, executive officers may not impose upon bidders for such contracts conditions or qualifications requiring conformity to the social, economic or political policies advocated by such officers, but not necessary to protect the United States in connection with the performance of the contracts, since the imposition of such conditions or qualifications would manifestly tend to narrow competition for Government business and raise the prices required to be paid by the Government for articles or services purchased.

Thus, in 1890, the Attorney General held (19 Op. Atty. Gen. 685) that, in the absence of express

[1] *Schneider* v. *United States*, 19 Ct. Cl. 547; *Scott* v. *United States*, 44 Ct. Cl. 524; 19 Op. Atty. Gen. 685; 28 Op. Atty. Gen. 384; 38 Op. Atty. Gen. 555, 557.

statutory authority, an executive department might not impose as a condition upon bidding on a contract an agreement to conform to a schedule of maximum hours for workers employed in the performance of the contract. Similarly, in the absence of such authority, an executive department may not lawfully include in invitations for bids and contracts for Government work stipulations requiring contractors to pay any specified wage rates to employees engaged in the performance of such contracts (10 Comp. Gen. Dec. 294).[2]

The decision of the Comptroller General last cited was rendered on January 10, 1931, in response to a request made by the Secretary of the Treasury at the instance of the President for a ruling as to whether there could be included in invitations for bids on a government construction project a provision requiring the contractor to pay

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[2] This decision of the Comptroller General has been followed in practice by all the executive departments of the Government, and was expressly confirmed by the Senate Committee in charge of the Walsh bill (S. 3055, 74th Cong., 1st Sess.) hereinafter discussed. In explaining the desirability of a statute authorizing the insertion of a minimum wage stipulation in contracts for Government supplies, the Senate Committee Report (No. 1157, 74th Cong., 1st Sess.) on such bill stated:

> "The committee believes that in the absence of action by Congress the Executive has power to require any condition in contracts, loans, or grants necessary to protect the United States but that his authority stops there and that matters of general policy not strictly necessary to secure to the United States the performance of a contract can only be laid down by Congress."

To the same effect as the decision of the Comptroller General cited in the text, see 19 Comp. Gen. Dec. 673 (1940).

employees on such work the "local wage scale" or the "prevailing rate of wages in the locality or metropolitan area in which the project is being constructed."

Since such decision of the Comptroller General, there has been a series of statutory provisions, of which Section 1(b) of the Public Contracts Act is one, designed to carry out a general policy that the wages paid by contractors performing Government work, or work financed by the Government, should conform to the currently prevailing wage rates or minimum wage rates for like work in the locality where the work is to be performed.[3]

2. The Bacon-Davis Act.

The Bacon-Davis Act (46 Stat. 1494), introduced in Congress on January 27, 1931, 17 days after the above-mentioned decision of the Comptroller General, and presumably in consequence thereof, was the first of such statutory provisions. A copy of such act, as amended on August 30, 1935, (49 Stat. 1011), is set forth in Appendix III. As so amended, it requires, in substance, (a) that the advertised specifications for every Government construction contract in excess of $2,000 shall state the minimum wages to be paid each class of workmen employed by prime or sub-contractors at the construction site, which wages shall be "based upon" the prevailing wages, to be determined by the Secretary of Labor, for projects of similar character "in the city, town, village, or other civil sub-division of the state in which the work is to be performed"; and (b) that every such contract

[3] See the statutes cited at pp. 44-45, *supra*.

shall contain a stipulation requiring payment of such wages to such workmen.

The territorial units within which such prevailing wages are authorized to be determined under the Bacon-Davis Act as aforesaid, were described by Representative Bacon of New York, co-author of the statute, in the House debates preceding its adoption, as "communities",[4] and are described by the Secretary of Labor in her regulations for predetermining such prevailing rates as "localities".[5]

The basic principle of the Bacon-Davis Act is that the contractor shall pay to his employees not less than the wage which prevails at the place, i. e.,—in the community or locaiity,—where the Government work is to be done. This serves to preserve the local wage standard and to avoid placing the Government in the position of inducing wage cutting. It also generally assures that a wage which is fair, in view of all the circumstances, will be paid on Government work.[5a]

That wage will, of course, differ from community to community, as local conditions vary, but, in each instance, there remains what may be called the circumstantial guarantee of its fairness. That guarantee is that most of the employees and most of the employers in the particular community accept that wage as a proper one in view of the peculiar circumstances and conditions obtaining in the community.

All other provisions of the Bacon-Davis Act constitute mere machinery for the effectuation of

[4] 74 Cong. Rec. 6511.

[5] Regulations No. 503, U. S. Dept. Labor (Sept. 30, 1935), § 2.

[5a] H. R. Report No. 2453, 71st Cong., 3rd Sess., p. 2.

the central principle outlined above. Thus, when originally enacted in 1931, the statute did not provide for predetermination of the prevailing wage prior to award of the contract, but merely provided for arbitration of any dispute pertaining thereto by the Secretary of Labor. In the 1935 amendment to the statute, the Congress provided for predetermination of prevailing wages by the Secretary in order that the contractor might know in advance the minimum wage he would be required to pay. This, of course, in no way changed the fundamental principle of the statute. Whether or not the wage was predetermined, the guiding principle was that the contractor must undertake to pay his employees the prevailing wage in the community in which the contract work was to be performed.

It will be noted that the Bacon-Davis Act applies only to construction contracts.[6] Wages to be paid in the performance of supply contracts were not regulated until 1933.

3. The N. I. R. A. and its invalidation.

Through executive action taken pursuant to the National Industrial Recovery Act (48 Stat. 195), the scope of regulation of the wages to be paid, and other labor conditions to be observed, by Government contractors was greatly expanded. By executive orders (Executive Order No. 6246, dated August 10, 1933, as supplemented by Executive Order No. 6646, dated March 14, 1934), the President required, in substance, that all Government

[6] The hours of labor for employees on construction contracts are regulated by the "eight-hour" law, Act of June 19, 1912, c. 174, 37 Stat. 137.

contractors (including supply contractors and subcontractors), as well as beneficiaries, direct or indirect, of Government loans and grants, agree to conform to the provisions of the applicable codes of fair competition approved under the National Industrial Recovery Act or, in the absence of an applicable approved code, with the provisions of the President's Re-employment Agreement. Such emergency codes contained provisions, given legal effect through executive action, which prescribed maximum hours, minimum wages and other labor conditions in industry,—in some instances on a national, in other instances on a regional or sectional basis.

When Title I of the N. I. R. A. was declared unconstitutional by this Court on May 27, 1935, in *A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, the operation of the various codes and of the above-mentioned executive orders was, of course, suspended.[7] Thereafter, in conformity with the established rule hereinabove referred to, the Comptroller General held that, except as authorized by the Bacon-Davis Act (or other statutes dealing with labor conditions), the executive departments could not lawfully require wage or other labor stipulations in connection with the bidding upon or award of Government contracts.[8]

It is a matter of common knowledge that immediately after the decision in the *Schechter* case the Administration issued an appeal to industry generally voluntarily to maintain the wages, hours and working conditions that had been established under the various codes and which had already

[7] Administrative Order GC-90, dated June 3, 1935, of the National Industrial Recovery Board.

[8] 14 Comp. Gen. Dec. 905; 15 Comp. Gen. Dec. 2.

been departed from to an undetermined extent. It also sought additional legislation [9] applicable to Government contracts, loans and grants which would, in substance, have required conformity to code or like conditions in the performance of such contracts and the expenditure of such loans and grants.

In so far as Government contracts were concerned, it was contended [10] that such legislation was necessary (a) in order to avoid placing the Government in the position of urging upon industry voluntary maintenance of code labor conditions while encouraging departure therefrom by awarding contracts to lowest responsible bidders, regardless of labor conditions; and (b) in order to encourage and protect the fair employer.

It is also a matter of common knowledge, however, that prior to the *Schechter* decision there was widespread dissatisfaction in many quarters with the code system and the codes; and that this dissatisfaction was shared by many who heartily favored wholesome and enlightened labor conditions, who wished to encourage the fair employer, and who desired to speed national recovery.

We shall hereinafter note certain of the objections, as expressed during the legislative proceedings leading up to the Walsh-Healey Act, to the attempted achievement of such ends by the code method,—involving executive wage fixing, hour limitation and other labor regulation under authority broadly delegated,—or by any similar method to be applied to Government contracts. We

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[9] That is, the Walsh bill (S. 3055, 74th Cong. 1st Sess.) hereinafter discussed.

[10] See H. R. Hearing on S. 3055, 74th Cong. 1st Sess., pp. 12, 13.

are not now concerned, and will not then be concerned, with debating the validity of such objections or the social, economic or political wisdom thereof. The important points are that such views existed and were strongly entertained both within the Congress and without; and that their existence and forceful presentation eventually resulted in changing almost beyond recognition both the terms and certain of the objectives of the legislation dealing with Governments contracts, as originally introduced at the behest of the Administration.

B. The successive steps in the legislative history of the Walsh-Healey Act.

1. The Walsh bill and its failure of enactment.

On June 14, 1935, Senator Walsh of Massachusetts, at the request of the Administration,[11] introduced in the Senate a bill (S. 3055—74th Cong., 1st Sess.) providing (§1), in substance, *inter alia*, for the inclusion in all proposals (bids) or contracts for Government work of agreements that all persons in classes of employment described in the invitations to bid, when engaged in work necessary to the performance of the contract by a contractor or sub-contractor, should be paid not less than the minimum wages and employed not to exceed the maximum hours designated specifically or by reference in such invitations to bid. Like agreements were to be required in connection with loans or grants (§ 2).

The bill, as it was passed by the Senate on Au-

[11] 79 Cong. Rec. 12728.

gust 12, 1935,[12] provided (§§ 8 and 10) that the minimum wages and maximum hours so specified or referred to should be determined by the President or such agency as he might designate, provided that the wages and hours so fixed should be "fair and reasonable taking into account the following primary standards":

> "(a) The cost of living;
> "(b) The standards for the same class of labor in the same locality;
> "(c) The standards in effect for such class of labor during the year 1934; and
> "(d) The minimum rates of pay and maximum hours of labor specified in the applicable codes of fair competition * * * or where there were * * * no approved codes * * *, in the President's Reemployment Agreement * * *".

The bill so passed also provided for stipulations against the use of child labor (as therein defined) and convict labor.[13]

The Walsh bill was thus on its face, among other things, a wage-fixing measure. Within a week after its passage by the Senate, the House Judiciary Committee held hearings upon it.[14] At such hearings the measure met with a storm of objections, among which were the objections that it was an attempt to revive the N. I. R. A. and the codes, with their alleged evils and weaknesses;[15] that it conferred a virtually unfettered

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[12] A copy of such bill as passed by the Senate is set forth in Appendix IV.

[13] See § 1, Appendix IV, p. 22.

[14] H. R. Hearing on S. 3055, 74th Cong. 1st Sess., Serial 12.

[15] *Id.*, pp. 38-10.

discretion to fix wages and unlawfully delegated legislative authority;[16] that, in exercising the power so granted, the wage-fixing agency might disregard existing wage differentials between rural or other small communities and large cities and, in so disregarding the prevailing local standards, drive out of competition for Government contracts, and destroy, rural and small-town industry;[17] that the wage-fixing agency might likewise disregard existing differentials between the various regions and sections of the country;[18] and that the inevitable effect of such legislation would be to foster monopoly.[19] After holding such hearings the House Judiciary Committee decided not to report the bill.

2. The Healey bill.

On March 2, 1936, at the next session of the 74th Congress, Representative Healey of Massachusetts, a member of the House Judiciary Committee, introduced a new bill (H. R. 11554—74th Cong., 2nd Sess.), drawn by a sub-committee, of which he was chairman, with the assistance of the Department of Labor.[20] That bill, a copy of which is set forth in Appendix V, eliminated certain of the features criticized in the Walsh bill, including, *inter alia*, specific reference to the codes, coverage of loans and grants, and certain of the penalties on contractors for violation of stipulations by subcontractors.

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[16] *Id.*, pp. 38, 50.
[17] *Id.*, pp. 58, 63, 87, 88, 91, 94, 95, 397.
[18] *Id.*, pp. 35, 53-56, 397.
[19] *Id.*, pp. 35, 55, 58, 89, 95.
[20] H. R. Hearings on H. R. 11554, 74th Cong., 2nd Sess. Serial 12, Part 2, pp. 124, 228.

It provided (§ 1), among other things, that all bids upon or contracts for Government work in an amount exceeding $2,000 should contain a representation or agreement that all persons employed upon the work in classes of employment described in the invitation to bid should be paid not less than such minimum rates of pay and employed not to exceed such maximum hours as should be designated specifically or by reference in the invitation to bid. It further provided (§ 9) that such minimum wages and maximum hours should be determined by the Secretary of Labor; that the minimum wages so fixed should be "fairly and reasonably commensurate with the value of the service or class of service rendered" and that:

> "* * * In establishing a minimum wage for any service or class of service under this Act the Secretary without being bound by any technical rules of evidence or procedure (1) may take into account all relevant circumstances affecting the value of the service or class of service rendered, (2) may be guided by like considerations as would guide a court in a suit for the reasonable value for services rendered where services are rendered at the request of an employer without contract as to the amount of the wage to be paid, and (3) may consider the wages paid for work of like or comparable character by employers who voluntarily maintain minimum fair-wage standards; * * *."

The bill also provided (§ 1) for stipulations against the employment of child labor (as therein defined) and convict labor, and that all the foregoing stipulations should be applicable to sub-contractors (§ 2).

H. R. 11554 was thus also clearly intended to authorize the fixing of wages, either nationally or in large sections or regions of the country, as the Secretary of Labor might decide.

3. The hearings on the Healey bill.

A sub-committee of the House Committee on the Judiciary promptly held extensive hearings,[21] which were attended by a number of members of the Committee as well. What transpired at such hearings is of great importance for the reason that, as stated by Representative Healey on the floor of the House when the legislation was eventually reported, "many changes" were made to meet the objections voiced thereat.[22] For the convenience of the Court, copies of the report of such hearings will be handed up at the time of the argument.

(a) The focus of the controversy before the Committee—wage and hour regulation.

There was very little serious controversy about the convict and child labor provisions of the bill. Nor, as the hearing proceeded and pertinent testimony was adduced,[23] was there any real disposition to quarrel with the propriety of legislation designed to attack the problems of bid-brokerage and home work (not covered in the bill, as introduced), which together with child labor, were

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[21] H. R. Hearings on H. R. 11554, Serial 12, Part 2. The report of such hearings is hereinafter cited as "Hearings".

[22] 80 Cong. Rec. 10001.

[23] Hearings, pp. 164, 203-209.

stated to be primary factors in producing sweatshops.[24]

The pivotal issue was the enormous power that the bill would confer upon the Secretary of Labor to fix wages and hours.[25] In this connection it is appropriate to note at the outset that both supporters[26] and opponents[27] of the measure were agreed that, although limited in terms to performance of Government contracts, the wage and hour regulation contemplated thereby would not be so limited in practical effect, but would, on the contrary, extend to virtually all work carried on by those performing Government contracts, due to the impracticability of separately carrying on, and maintaining different working conditions with respect to, the two types of work in the same plant. It was also agreed that Government contracts were of great importance to industry.[28]

(b) The arguments of those advocating the wage and hour regulation contemplated by the measure.

Supporters of the bill argued that such wage and hour regulation was necessary because the Government's policy of letting contracts to the lowest responsible bidders, without regard to their labor conditions, was causing employers to cut wages and lengthen hours in order to obtain or perform such contracts.[29] Certain statistics were adduced showing wage-cutting and hour lengthen-

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[24] *Id.*, pp. 203-209.
[25] *Id.*, pp. 388, 447.
[26] *Id.*, p. 390 (William Green).
[27] *Id.*, pp. 237, 275, 308, 309, 311, 317, 327, 440.
[28] *Id.*, pp. 157, 160.
[29] *Id.*, pp. 153, 208, 212, 222, 268.

ing by firms receiving Government contracts.[30] There was danger, it was stated,[31] that this process would force the majority of employers, who were fair, to emulate their wage-cutting and hour-lengthening competitors. It was urged that the pending legislation should be passed in order to protect and encourage fair employers already observing the conditions that would be enforced under the Act.[32] It was maintained[33] that, unless this action were taken, the Government would be in the position of urging such employers voluntarily to continue such conditions, while itself aiding their non-conforming competitors.

There was also some testimony as to the disparity between wage conditions in the various states and with regard to industrial migration from high-wage areas to lower-wage areas;[34] but these considerations were not generally advanced as reasons for enactment of the pending bill. Indeed, Senator Walsh indignantly denied[35] that the legislation had been introduced either to protect or favor industry in his home state (said to be a high-wage state), as petitioners seem to imply (Br., pp. 108-112).

The alarm of the opponents of the measure at the authority over wages that it would confer on the Secretary of Labor was considered unjustified by the supporters of the measure,[36] including the

[30] *Id.*, pp. 131-153.
[31] See Note 29, *supra*. See also Hearings, pp. 364, 366.
[32] Hearings, pp. 162, 169, 211, 228, 231, 269, 361.
[33] *Id.*, pp. 153, 189, 211, 222.
[34] *Id.*, pp. 282.
[35] *Id.*, pp. 412.
[36] *Id.*, pp. 178, 361, 189.

Secretary,[37] for the asserted reason that in making her determinations she would fix the minimum wages prevailing, even though not required to do so by the terms of the bill.

(c) The objections advanced against such wage and hour regulation.

Each of the contracting officers representing executive departments and 34 of the 35 representatives of industry who appeared or filed statements at the hearing opposed the bill. Their testimony on certain of the more important phases of the proposed wage and hour regulation may be summarized as follows:

(1) *No General Wage and Hour Regulation.* Practically every opposition witness, including representatives of the Navy[38] and War[39] Departments, and witnesses who concededly represented "fair" employers,[40] opposed all provisions of the bill, except the relatively non-controversial portions referred to above. It was pointed out that the statistics adduced and the testimony of the witnesses favoring the legislation showed that wage-cutting and increased hours were confined to a relatively few industries, such as the garment and like industries, peculiarly subject to sweatshop conditions.[41] It was specifically noted that in the major and heavy industries,[42] and particularly the

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[37] *Id.*, pp. 222.
[38] *Id.*, pp. 179-188.
[39] *Id.*, pp. 165-170, 171-175.
[40] *Id.*, pp. 394, 449.
[41] *Id.*, pp. 169, 179, 277, 398, 545. This was admitted by various witnesses supporting the bill. See, e. g., p. 269.
[42] See note 41, *supra.*

steel industry,[43] none of the tendencies decried by the proponents of the legislation was discernible. It was, therefore, urged that if any such legislation were enacted, it should not be applicable to industry generally, but should be confined in its application (either directly, or in the discretion of the Department letting the contract) to those industries in which wage-cutting and lengthened hours existed in appreciable degree.[44]

(2) *Excessive and Indefinite Delegation of Authority.* Numerous witnesses urged that the bill would unlawfully delegate legislative authority to the Secretary of Labor, for the reason that the standards provided were so vague and indefinite as virtually to confer a blanket, life and death, power to fix wages and hours in industry.[45] Many others urged that, regardless of the constitutional validity of any such grant of power, it was socially, economically and politically most unwise to confer upon any executive officer or officers,—particularly the Secretary of Labor,[46]—any such enormous and indefinite power over the national economic life.[47] Although opposed to any rigid specification of hours of employment, on the ground that necessary flexibility in production would be destroyed, they stated that they would rather have Congress set definite limits than invest the Secretary with a practically unlimited discretion to change the rules

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[43] *Id.*, pp. 290, 296.

[44] See, e. g., the testimony of Col. Corbin, office of the Quartermaster General, Hearings, p. 171. See also p. 461.

[45] *Id.*, pp. 246, 307, 311, 392, 439, 451, 543, 549.

[46] *Id.*, pp. 298, 406.

[47] *Id.*, pp. 257, 266, 298, 299, 321, 322, 359, 394, 543, 545, 549.

of production at any time.[48] Their fears that the gravest social and economic consequences, including dislocation of the industrial structure, retardation of economic recovery and increased unemployment, might result from exercise of the wage-fixing power by a single individual or a small group, were not soothed by the proffered assurances that the Secretary of Labor would fix prevailing minimum wages.[49] On the contrary, a much more live and realistic issue, aggravated by those very assurances, was: "Minimum wages which prevail,—where?"

(3) *Wage Differentials Between Localities.* Indeed, among the most vehement and insistent objections made to the bill were those that the Secretary would be empowered thereby to disregard or change the wage differentials existing between communities, particularly between rural communities or small towns and large cities, and to fix uniform wages in such localities.[50] In this connection statistics were submitted to prove that the cost of living in the smaller communities was sub-

[48] *Id.*, pp. 348.

[49] The impression which petitioners seek to create (Br., pp. 125-126, particularly note 16) to the effect that the principal controversy before the Committee was as to whether the Secretary of Labor should have the authority to fix any wage she pleased, or whether her authority should be that of establishing wages most prevalent in industry over broad areas, is incorrect, and does not reflect the facts. On the contrary, as shown herein, the Secretary of Labor had indicated that she would be pleased to be authorized to establish "prevailing" wages over broad areas; and this, in and of itself, gave rise to numerous objections. It is interesting to note that petitioners cite no authority for their statement.

[50] Hearings, pp. 237, 239, 245, 249, 250-251, 291, 302-304, 309, 313, 393, 402-412, 422-436, 440.

stantially lower than in the larger communities;[51] that the labor in many such small communities was not as efficient as the more highly-skilled labor in the larger and longer-established industrial communities;[52] and that such smaller localities were generally at a competitive disadvantage, when compared to such larger and better-established industrial centers, in the matter of cost of transportation, access to raw materials, proximity to markets and other elements affecting the cost of production.[53] Consequently, it was argued that the lower rates of wages prevailing in such smaller localities not only resulted in payment of real wages equivalent to, or higher than, those in the larger cities,[54] but that the disturbance of the existing local wage differentials would result in the destruction of such local industries, unemployment of the workers therein, increased centralization of industry, and a monopoly of Government business, if not all business, in the hands of the larger companies situated in the great industrial centers.[55] Particular apprehension was expressed [56] because the Secretary of Labor, in testifying before the sub-committee, had clearly indicated that she was opposed to any geographic wage differentials and, if the bill were passed, would tolerate them only in large zones, if at all.[57]

(4) *Regional and Sectional Wage Differentials.* Like objections were voiced by many witnesses who

[51] *Ibid.*, pp. 430-432.
[52] *Ibid.*, pp. 409, 426.
[53] *Ibid.*, pp. 393, 426-430, 250-251, 291.
[54] *Ibid.*, pp. 405, 426, 428, 430-432, 393.
[55] *Ibid.*, pp. 237, 250-251, 393, 404-12, 422-436.
[56] *Ibid.*, pp. 410, 429.
[57] *Ibid.*, p. 226.

pointed out that the bill would permit the Secretary to ignore regional and sectional wage differentials arising out of differing economic conditions, and economically necessary to the continuance of industry in such sections or regions.[58]

(5) *Interference with Procurement—Monopoly.* The Committee was repeatedly advised that grave injuries to the procurement activities of the Government itself might result from the bill.[59] Without regard to sweatshop operators, it was pointed out that competition for Government work would inevitably be narrowed if reputable manufacturers were compelled to depart from their existing, locally prevailing standards in order to obtain Government work, since to change would weaken their ability to compete for private business.[60] It was also pointed out that, if required so to change, many such manufacturers could not successfully compete with those more favorably situated geographically or operating under differing conditions of production.[61] In this connection it is significant to note that representatives of the Navy and War Departments, who appeared and criticized the bill, expressed apprehension that, for these and other reasons, it would unnecessarily interfere with their procurement activities by narrowing the field of bidders and increasing prices.[62] They and other witnesses pointed out that every additional restriction tended to diminish the number of bidders on

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[58] *Ibid.*, pp. 249, 291, 293, 295, 309, 393, 488, 492.
[59] See, e.g., Hearings, pp. 166-170, 179-180, 275, 308, 393, 394.
[60] *Id.*, 275, 308, 359, 394, 492.
[61] See note 55, *supra*.
[62] *Id.*, 179, 181, 185, 166-168.

Government contracts, and urged that the Committee proceed with caution.[63]

(6) *Craft Wages.* The provision of the bill authorizing the Secretary of Labor to fix the wages of every classification of employees engaged in the performance of a contract was also severely criticized,[64] not only on the ground stated in (2) above, but also on the ground that any such attempted classification would create hopeless confusion and unnecessary complexity in administration and enforcement. Classifications of workmen, and the degree of skill required to qualify for any classification, it was pointed out, would vary between sections, towns and plants.

(7) *Sub-contractors.* The provisions of the bill applying to sub-contractors, including its requirement that prime contractors cancel contracts of non-conforming sub-contractors, were strenuously objected to, on the grounds that they would create grave difficulties of enforcement and would place an unfair burden on prime contractors, which would not be assumed.[65]

(8) *Contracts Covered.* It was urged that construction contracts should not be subject to the bill, since already covered by the Bacon-Davis Act and the Eight-Hour law.[66] It was also strongly recommended that, if any legislation applicable to supply contracts should be reported by the Committee,

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[63] See note 62. See also Hearings p. 185, 237, 399, 459, 487.

[64] *Id.*, 166-167, 254, 397.

[65] *Id.*, 254-255, 486.

[66] *Id.*, 514-515.

the legislation should be limited in its coverage to contracts for amounts substantially in excess of the $2,000 limit provided in the pending bill.[67] It was contended that the pending bill would bring so many supply contracts within its purview that insuperable problems of inspection and enforcement would be created.[68] The net result, it was stated, would be that the unscrupulous law-evader would profit at the expense of the scrupulous business man.[69] A $10,000 limitation was suggested by representatives of the War Department and industry.[70]

As hereinafter shown, the Committee, in its subsequent revision of the bill, made changes to satisfy each of the above objections except the first, namely, that there should be no wage or hour regulation at all.

(d) The Committee reaction to the testimony; careful inquiry into the operation of the Bacon-Davis Act.

The record of the hearings shows clearly that members of the subcommittee and of the Judiciary Committee in attendance were much impressed by this barrage of objections[71]. Various witnesses were asked, in substance, by both majority and minority members whether the bill might not properly be limited to the prohibition of child labor and the other relatively non-controversial matters re-

[67] See, e.g., Hearings, pp. 166, 259, 487.
[68] See note 67, *supra*.
[69] See note 67, *supra*.
[70] See note 67, *supra*.
[71] See, e.g., Hearings, pp. 248 (Mr. Sumners), 250-251 and 294 (Mr. Chandler), 388 (Mr. Duffey), 390 (Mr. Walter), 480 (Mr. Chandler).

ferred to above [72], and/or if its wage provisions might not properly be so restricted as to make applicable to supply contracts the basic principles of the Bacon-Davis Act, i.e., the required payment of a wage prevailing at the place of performance of the contract.[73]

In this connection, it is significant to note that the Secretary of Labor and a number of other witnesses were examined at length concerning the Bacon-Davis Act, its operation, administration and effect. The Secretary testified, among other things, as follows: [74]

"MR. HEALEY. Your department administers the enforcement of the Bacon-Davis Act, does it not?

Secretary PERKINS. Yes, sir; it does.

MR. HEALEY. In connection with that function you predetermine the prevailing wages for the various *localities* of the country for the building trades?

* * * * * * *

Secretary PERKINS. Yes, sir;

* * * * * * *

MR. HEALEY. Does it require a great personnel in your Department for the administration of that Act?

Secretary PERKINS. Not very large; no, sir.

MR. HEALEY. Have you had a great deal of difficulty in administering it?

Secretary PERKINS. *Surprisingly little.*

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[72] Hearings, pp. 292-293; 331-333 and 399 (Mr. Citron).

[73] *Id.*, pp. 184 (Mr. Hess), 331 (Mr. Citron), 390 (Mr. Walter).

[74] *Id.*, pp. 229-230.

MR. HEALEY. So no additional personnel is required for the enforcement of that particular act. Is that correct.

Secretary PERKINS. That is so far as the contracting agency is concerned. When a request for predetermination is received, the Department of Labor sends a referee to the project.

* * * * * * *

MR. HESS. Under the Bacon-Davis Act all you determine is the wages and hours prevailing in the *locality* where the building is to be constructed?

Secretary PERKINS. For *every classification* of work.

MR. HESS. But just in that one *locality*.

Secretary PERKINS. Yes, sir; just in that one *locality*. Of course, this is what happens. *The work is all over the country; it is scattered everywhere, and it means that we have to consider every part of the country.* But once you have held a hearing in an area and know what the general prevailing wages are in that large area you will find the correction is very slight. As between one town and another town in the same county, or in the same *State*, the difference is extremely slight. * * * (Italics ours)

Mr. W. E. Reynolds, Assistant Director of Procurement, testified [75] that from January 9, 1936, to January 17, 1936, contracting officers had requested of the Department of Labor predeterminations under the Bacon-Davis Act of the "prevailing wages in the locality in question" on 315 construction projects; that there had been some delay in that connection; but that, generally speaking, there

[75] *Id.*, pp. 233-234.

had not been a great deal of difficulty in administration.

Mr. Gerard Reilly, Acting Solicitor of the Department of Labor, testified regarding the effect of the Bacon-Davis Act, as follows: [76]

> "MR. HEALEY. Can you tell us something about the experience * * * with the enforcement of the Bacon-Davis Act?
>
> MR. REILLY. Yes. * * * The statute does not say anything about the use of local labor, but does require the *local* prevailing wage standard. Its effect has been to preserve *local* standards.
>
> * * * * * * *
>
> MR. MICHENER. Prevailing wages in the *community?*
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> MR. REILLY. Yes." (Italics ours.)

(e) The employment of the terms "locality" and "community" during the hearing.

It will be observed that during the foregoing colloquies both Representatives Healey, Hess and Michener, on the one hand, and the Secretary of Labor and other witnesses, on the other, described the territorial units within which prevailing wages are determined under the Bacon-Davis Act as "localities" and "communities"; and that the Secretary of Labor referred to a state as a "large area".

This employment of terminology was characteristic of the entire hearing. Members of the subcommittee and Committee [77] and witnesses, offi-

[76] *Id.*, pp. 128-130.

[77] See, e.g., Hearings, pp. 234, 236, 245, 248, 249, 255, 371, 375.

cial and unofficial,[78] repeatedly characterized the unit for wage determination under the Bacon-Davis Act as the "locality" or "community" in which the work in question was to be performed; used the terms "locality" and "community" interchangeably; and, in thus employing such terms in their commonly-accepted sense, fully understood that they were describing small, local geographical areas, such as cities, counties, etc.

(f) The testimony bearing on practicality of administration.

It will also be observed from such colloquies that the Secretary of Labor testified most emphatically that no undue administrative burden had been cast upon her Department by the requirement of the Bacon-Davis Act that prevailing wages should be determined for every classification of employment on construction projects in the hundreds of localities scattered throughout the nation. Indeed, although conceding that the pending measure was very "complex",[79] in that it would have authorized the fixing of wages and hours, in the light of the standards imposed, for every classification of labor in virtually every industry in the United States, she and her associates in the Department of Labor expressed a willingness to undertake the task and the conviction that the Healey Bill and the Walsh Bill were "administratively workable".[80] The Secretary and her associates did sug-

[78] See, e.g., Hearings, pp. 187, 212, 233, 237, 255, 291, 302, 304, 327, 328-329, 342, 361, 373, 393, 397, 404, 406, 423, 425, 427, 429, 433.

[79] Hearings, p. 232.

[80] H. R. Hearing on S. 3055, 74th Cong., 1st Ses., at p. 13.

gest, however, that the bill should be amended so as expressly to provide that wage stipulations should not be inserted in contracts until applicable wage "findings" had been made after unhurried hearings that would permit action on a "scientific basis".[81]

Other witnesses appearing before the Committee, including William Green, President of the American Federation of Labor, stated that it would be a simple task for the Department to ascertain "what the prevailing rate of wages is in every city or town in the United States" [82] and that "in most every community * * * it is easy to determine what is the wage paid in * * * different industries".[83] Members of the Committee and subcommittee expressed the same view.[84]

On the other hand, Mr. Reilly, Acting Solicitor of the Department of Labor, pointed out the self-evident fact "that in advertising a contract which has no fixed situs * * * it would be difficult to know in just what *locality* the work would be done" [85]; and certain witnesses therefore urged that the requirements of the Bacon-Davis Act could not practically be extended to supply contractors, since to do so would virtually require the Secretary of Labor to pre-determine the prevailing wage for each classification of industrial employment in each locality in which the particular industry was carried on.[86]

Still other witnesses, who were violently opposed

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[81] Hearings, p. 125.
[82] *Id.*, p. 285.
[83] *Id.*, pp. 372-373.
[84] *Id.*, pp. 249-250.
[85] *Id.*, p. 180.
[86] *Id.*, pp. 396-397.

to the bill in its existing form, stated that if such procedure could be worked out practically, they would have no objection to it.[87]

4. The revision of the Healey bill by the House Judiciary Committee in the light of such hearings; the report of the revised bill as an amendment, in the nature of a substitute, to the Walsh bill; and the enactment of such amendment, substantially as reported, as the Walsh-Healey Act.

After such hearings H. R. 11554 was entirely rewritten by the House Judiciary Committee and on June 5, 1936,[88] was reported to the House, as so rewritten and without further hearings, as an amendment, in the nature of a substitute, to S. 3055. The bill, as reported, was, in all respects here material, in exactly the same form as that subsequently passed by the House and Senate. The Committee, in rewriting the bill, thus, *inter alia*,

(a) added to the bill provisions prohibiting in terms or in effect the following practices with respect to, or in the performance of, the contracts subject thereto: bid brokerage, home work, and work under unsanitary, hazardous or dangerous working conditions as, in substance, prohibited by applicable State law (§ 1(b), (e));

(b) eliminated from the purview of the legislation construction contracts, which were already covered by the Bacon-Davis Act (as to wages) and

[87] *Id.*, pp. 292, 300.

[88] H. R. Report No. 2946, 74th Cong., 2nd Ses.

the Eight-Hour law (as to hours); contracts for supplies in an amount of $10,000 or less (§ 1); and operations of sub-contractors;

(c) withdrew from the Secretary of Labor all authority to fix wages or hours under the vague standards provided in the original bill, or otherwise;

(d) definitely provided for the 8-hour day and 40-hour week (§ 1, (c)), subject to increase only under specific exemption to be granted by the Secretary of Labor (§6);

(e) definitely limited the requirement with regard to the minimum wages to be paid under any contract to the prevailing minimum wages on similar work or in the particular or similar industries or groups of industries in the locality in which the contract work was to be performed (§ 1(b)); and

(f) expressly provided that minimum wage stipulations should be included only in contracts relating to such industries as should theretofore have been the subject matter of a wage determination by the Secretary of Labor (§ 11).

A rule for consideration of, and limited debate upon, the revised bill was reported by the House Rules Committee and agreed to on June 18, 1936.[89] On the same date the bill was debated and agreed to, without material change, by the House sitting as a Committee of the Whole.[90] Without further debate the bill was formally passed by the House on June 19, 1936.[91]

The House amendments were concurred in by

[89] 80 Cong. Rec. 9991-9995.
[90] 80 Cong. Rec. 10001-10026.
[91] 80 Cong. Rec. 10201.

the Senate, without debate, on June 20, 1936.[52] On June 30, 1936, the President signed the bill.

C. The reasons for, and the significance of, the Judiciary Committee's revision of the Healey bill; the purposes of the legislation, as so revised and enacted; and the meaning necessarily to be assigned to its material provisions in the light of its legislative history.

1. The general purpose of the Committee in revising the Healey bill and of the legislation thus framed.

In the light of the testimony at the hearings, a mere cataloguing of the changes made in the Healey bill by the Committee (see pp. 92-93, *supra*) demonstrates that the purposes of the Committee in effecting its revision were: first, to incorporate in the legislation the additional prohibitions against sweatshop practices which were not included in the original bill but which received general approval at the hearings (p. 77-78, *supra*); and second, to satisfy each of the major objections, made at the hearings and listed above (supra, pp. 80-86), to the earlier draft of the measure, except one, viz: that the bill should not regulate wage and hour standards of Government contractors at all.

The Committee thereby sought to fashion a measure which, though not necessarily a perfect or permanent solution of the social, economic and political problems involved, was nevertheless a constructive compromise which would be definite in its terms, would command general acceptance,

[52] 80 Cong. Rec. 10538.

could be effectively enforced and would not unduly interfere with Government procurement in attaining social objectives.

The philosophy underlying this approach of the Committee may thus be summed up as follows:

The Committee, like all decent Americans, deplored the sweatshop and its characteristic practices,—long hours, low wages, unsanitary working conditions and child labor. It also believed that a work week longer than that then generally observed [93] and wage-cutting were detrimental to the national welfare. It was concerned with the asserted tendency of Government procurement to promote such evils and to discourage fair employers from maintaining decent labor standards. It desired to encourage such employers.

But like all practical Americans, the Committee wished to attack such evils and provide the desired encouragement without creating new and possibly greater problems and evils. It did so by recommending action of carefully defined scope in a carefully limited field, thoughtfully delineated in order to avoid the pitfalls brought to its attention at its hearings. *Thus*, and *only thus*, were the evils to be attacked and the desired encouragement afforded.[94]

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[93] See 80 Cong. Rec. 10002, 10004, for statements by Representatives Healey and Walter that the eight hour day and forty hour week were generally observed.

[94] The argument of petitioners completely ignores these considerations. They urge, in effect, that, because the Committee and the Congress which acted on its recommendations were against sweatshops, the measure fashioned by the Committee should be interpreted to confer a roving commission upon the Secretary of Labor in her discretion and without statutory guide to compel either the manufacturers in any hamlet or manufacturers in the entire United States, or any part thereof, to agree to pay the same wage in competing for Government contracts.

As stated by the Committee in its report: [95]

> "The object of the bill is to require persons having contracts with the Government to conform to *certain labor conditions* in the performance of the contracts and *thus* to eliminate the practice under which the Government is compelled to deal with sweatshops." "* * * * in recent months the requirement that Government contracts *must* go to the lowest bidder, regardless of his labor practices, has tended to depress the advance in wages and purchasing power achieved during the first 2 years of the administration. Passage of this bill will end the present paradoxical and *unfair* situation in which the Government on the one hand urges employers to *maintain and uphold fair labor standards*, and on the other hand gives vast orders for supplies and construction to the lowest bidder, often a contractor or manufacturer whose own labor policies offend *all decent social standards*." (Italics ours.)

2. Limitation by the Committee of the scope of the legislation.

This approach of the Committee is graphically illustrated by its limitation of the field in which the pending legislation should operate. Thus, in recommending the legislation, the Committee took an important step toward remedying the evils with which it was concerned and providing the desired encouragement to employers maintaining the prescribed standards.

But none of the prohibitory or regulatory provisions of the bill was given sweeping application. On the contrary, through the Committee's amendment of the Healey bill, it was limited in its appli-

[95] H. R. Report No. 2946, 74th Cong., 2nd Ses., p. 4.

cation to contracts for supplies in excess of $10,000 and, even in respect of such contracts, it was not to apply to the work of sub-contractors.[96] The Committee thus deliberately excluded from the purview of the legislation more than 99% in number of the Government's supply contracts[97] and the work of all sub-contractors manufacturing or furnishing supplies used in performing all such contracts.

The reasons for such limitation are perfectly clear. It was not that the Committee considered that the employment of child labor, or any of the other practices referred to above, is any the less an evil if resorted to by a contractor holding a contract for less than $10,000, or by a subcontractor. The limitation was imposed to avoid practical obstacles and other evils which, as disclosed by the testimony at the hearings, might have been created by broadening the scope of the legislation. (See pp. 82-86, *supra*.)

This, then, was not sweeping legislation of broad scope, but was a legislative compromise designed to operate in a limited, carefully defined field. Nor was the regulation within that field intended to be any less definite.

3. The deliberate withholding by the Committee of the broad power to fix hours and wages which would have been conferred by the Healey bill.

As we have pointed out above (pp. 58-59, *supra*), a mere examination of the measure as a whole shows that it was not intended to confer broad

[96] *Ibid.*

[97] See S. Hearing on S. 1032, 76th Cong., 1st Sess., p. 27.

discretionary powers on the Secretary of Labor. If that were not clear from the Act itself, the statements of those who sponsored or had charge of the bill on the floor of the House clearly show the Congressional intent in this regard. Such statements furnish irrefutable confirmation of the purpose of the Committee to meet and satisfy, by withdrawing ill-defined regulatory power and leaving no room for the play of real discretion, the objection that the earlier drafts of the measure conferred upon the executive a virtually unfettered discretion to fix hours and wages. They also confirm the belief of the Committee that it had done so in the revised bill by confining the function of the Secretary with regard to wages to one of fact finding as distinguished from wage-fixing and by definitely prescribing the maximum hours of labor, subject only to the power of the Secretary to grant exemptions in certain instances.

In commenting on Section 1 of the bill, the Report of the Committee stated (p. 4):

> "This section is the basic section of the bill. It differs from the corresponding section in the Senate bill * * * in that *it sets a definite limit to hours of employment and fixes a more definite standard with respect to minimum wages* * * *. (Italics ours.)[98]

Representative Walter, a member of the subcommittee of the House Judiciary Committee and one of the four members of the House authorized to explain the measure under the rule of limited

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[98] It will be remembered that the minimum wage standard in the Senate (Walsh) bill was itself much more definite than that in the Healey bill. See pp. 74-76, *supra*.

debate prevailing, explained the purpose of the Committee in definitely providing for an 8-hour day and 40-hour week as follows: [99]

> "* * * the very reason why 40 hours was written into the bill was to eliminate the argument that we were giving to any executive branch the authority to fix hours."

Representative Healey, Chairman of the subcommittee of the Committee on Judiciary, in explaining the bill to the House made plain that its wage provisions were completely dissimilar to those in the National Industrial Recovery Act, which had authorized wage-fixing and had conferred a broad and indefinite discretion upon the executive. He emphasized not only the definiteness of the wage standard in the pending bill, but also that the power conferred upon the Secretary of Labor thereunder was purely a fact-finding power. He stated:

> "* * * We have had a great deal of talk about this bill being a small N. R. A. bill for government contracts. This is absolutely not true. This bill does not set the standard for minimum wages by reference to the codes that obtained under N. R. A., but *definitely* sets it as the prevailing minimum wage for similar work or in the industries operating in the locality in which the contract is to be performed. The bill merely provides for a *proper* determination by the Secretary of Labor with respect to such prevailing wage. * * * " [100]

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[99] 80 Cong. Rec. 10004.
[100] 80 Cong. Rec. 10002.

> "* * * As I view it, the prevailing wage is already a fact which already exists. The Secretary's duty is simply to inquire and ascertain what that prevailing wage is." [101] (Italics ours.)

It would have been difficult to make a more unambiguous statement that the Committee conceived that it had conferred upon the Secretary of Labor and her associates a mere fact-finding power, which could be performed with mathematical or statistical accuracy and without the interplay or decision of important questions of policy or the exercise of broad, undefined discretion.

Representative Walter, the second of the speakers sponsoring and in charge of the legislation and who explained its provisions to the House, reinforced the statements of Representative Healey. He denied that there was any *possibility* of executive wage-fixing under the bill and affirmed that the only authority conferred on the Secretary of Labor was that of factually determining, as under the Bacon-Davis Act, prevailing rates of wages in each "community". He stated: [102]

> "* * * If there is any grave difference of of opinion with respect to any portion of this bill, it certainly comes with respect to the *possibility*, if you please, of the Secretary of Labor fixing wages. There is no member of this House any more opposed to that idea than I am. I say to you frankly that I would not have voted to report such a bill, but *there is nothing in this measure* that gives to any one in any executive branch *any* authority to fix

[101] 80 Cong. Rec. 10003.
[102] 80 Cong. Rec. 10004.

wages. We have had no difficulty in determining what the prevailing rates of wages are under the Bacon-Davis Act. It has been a comparatively simple matter to go into each *community* in which government buildings are being constructed, and determine what every particular artisan is paid in that *community. The problem is the same here.* * * *" (Italics ours.)

4. The substitution, in lieu of the wage-fixing provisions of the Healey bill, of provisions embodying the basic principle of the Bacon-Davis Act, viz: required payment of a wage prevailing in the community in which the Government contract is to be performed.

From the language of the revised bill itself,—particularly when read in the light of the hearings held before the Committee,—and from the statements of Representative Walter, last quoted, and of others hereinafter quoted (pp. 104-110, *infra*), it is apparent that the Committee in its deliberations, while determining to impose wage regulation upon the Government supply contractors affected by the bill, likewise determined to apply thereto the basic principle of the Bacon-Davis Act.

The primary objectives to be attained by the legislation, as the Committee visualized them (see p. 94, *supra*), were: (a) to correct the tendency of Government procurement to encourage sweatshops, wage-cutting and longer work days; (b) thereby to attack the evils of sweatshops, wage-cutting and hour-lengthening; and (c)

thereby to encourage fair employers to maintain their decent labor standards. To the extent that such objectives were attained, the Committee thought purchasing power would be maintained or increased. The Committee was equally anxious, however, to avoid the many new problems and many new evils, including the limiting of competition for Government contracts, which witness after witness at its hearings had warned would flow from executive wage-fixing under a broad standard that would permit the wage-fixing authority to ignore differences in local, regional and sectional conditions and to fix uniform wages. (See pp. 82-84, *supra.*)

The adaptation to supply contracts of the basic principle of the Bacon-Davis Act was the obvious solution to the Committee thus seeking to steer between Scylla and Charybdis. In requiring payment of a wage prevailing in the community in which the work was to be done, the Committee guarded against wage-cutting to obtain or carry out Government contracts; encouraged the fair employer to maintain his existing wage standard; and obtained reasonable assurance,—that circumstantial guarantee underlying the entire prevailing wage concept,—that the Government would not be dealing with contractors paying unfair or sweatshop wages. And at the same time the Committee avoided the dangers which it was apprehensive might follow from adoption of the alternative presented in the original Healey bill, or any like alternative, of permitting the executive to fix wages without regard to local, regional and sectional wage differentials.

Petitioners' argument that Congress did not intend to carry into the Walsh-Healey Act the basic prevailing wage principle of the Bacon-Davis Act is based on the fact that the Walsh-Healey Act does not describe the unit for wage determination in the identical language employed in the Bacon-Davis Act, viz.: "city, town, village, or other civil subdivision of the State in which the work is to be performed"; but, instead, uses the term "locality", which is said to be highly flexible and to have been intended to embrace either a community or any larger geographical area (which may include the entire United States), depending on the circumstances of the particular case.

That argument ignores the fact that the unit for wage determination under the Bacon-Davis Act was repeatedly described in the hearings, both by members of the Committee, the Secretary of Labor and her associates, and other witnesses, as the "locality" or "the community"; that the terms "locality" and "community" were otherwise repeatedly used interchangeably in such hearings; and that both terms, in common usage, denote a small geographical area. It is not reasonable to suppose that the members of the Committee suddenly changed their usage, particularly when the particular terminology employed would determine one of the two pivotal issues developed at the hearings; when it would have been so easy to have omitted altogether the term employed or to have used some apt term, had it been the Committee's intent to confer upon the Secretary the vague, wage-fixing power which she now claims; and when every surrounding circumstance shows that it was the deliberate purpose of the Committee to withhold any such power.

But we are not left to inference. The statements on the floor of the House by those in charge of and sponsoring the bill show that the Committee did not change its usage; and reference to the debates further discloses that there was a common agreement and understanding among those who debated the bill that one of its important purposes was to apply to the Government supply contracts affected the basic principle of the Bacon-Davis Act.

We have already referred to the statements of Representative Walter, quoted *supra* at pp. 100-101.

Representative Citron, one of the members of the Judiciary Committee in constant attendance at the hearings and one of the members in charge of and sponsoring the legislation on the floor of the House (under the rule of limited debate prevailing) stated: [103]

> "* * * the Bacon-Davis Act * * * [provides] * * * that bidders for public works and public buildings cannot pay less than the prevailing rate in the *community* * * *.
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> * * * * * * *
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> "The bill before us is in substance an extension of the Bacon-Davis Act to all Government purchases amounting to over $10,000. * * *
>
> * * * * * * *
>
> "The bill merely provides that the Government shall have the right to refuse the bids on all purchases over $10,000 to those * * * (4) who pay less than the prevailing rate of wages in their *community* * * * ." (Italics ours.)

Representative Greenwood, the member of the Rules Committee who introduced the resolution

[103] 80 Cong. Rec. 10008.

containing the rule for consideration of, and limited debate upon, the bill, and who directed and controlled the debate on that resolution, stated:

> "Mr. Speaker, this resolution from the Committee on Rules provides for consideration of what is known as the Walsh-Healey Bill * * *. It provides that no less than the minimum wage shall be paid to workers in the *community* where the supplies are manufactured or where the work is performed. * * *
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> * * * * * *
>
> "Briefly, Mr. Speaker, this is a type of social security that has been considered for a great many years. The Government in buying its supplies should lead the way in providing reasonable hours of work, limiting them to 8 hours a day and 40 hours a week, and should provide a minimum wage according to the scale prevailing in the *community*." [104] (Italics ours.)

In answering a question as to the meaning and purpose of the legislation, Mr. Greenwood showed the same clear understanding of the meaning of the term "locality" and of the basic principle of the legislation, as is demonstrated by the following colloquy: [105]

> "MR. MARCANTONIO. When the gentleman speaks of shortening hours, he does not, of course, advocate cutting wages. In other words, the gentleman believes in keeping wages as they are.

[104] 80 Cong. Rec. 9992.
[105] 80 Cong. Rec. 9993.

"MR. GREENWOOD. This bill provides that they shall pay the prevailing wages in the *community* where the work is performed; so the bill takes care of the very proposition of which the gentleman speaks." (Italics ours.)

The same common understanding is shown by the following colloquy between Representative Cooper of Ohio and Representative Healey: [106]

"MR. COOPER of Ohio. I should like to ask a question in regard to the power given the Secretary of Labor to fix minimum wages. Let us assume an industry in a certain *locality* that has some Government contracts. [Here the gavel fell.]

"MR. HEALEY. Mr. Chairman, I yield myself 2 additional minutes.

"MR. COOPER of Ohio. Let us assume an industry has some Government contracts and it is also manufacturing material for private sale. If there is not any other industry of like character in that *community*, will the Secretary of Labor fix the minimum wage that is now paid in that industry?

"MR. HEALEY. That is an administrative problem. As I view it, the prevailing wage is already a fact which already exists. The Secretary's duty is simply to inquire and ascertain what that prevailing wage is.

"MR. COOPER of Ohio. That is what I wanted to know about." (Italics ours.)

Such colloquy shows, beyond doubt, that both Representative Healey and Mr. Cooper were in common understanding on the proposition that the unit for wage determination was the "community". Had Representative Healey not proceeded on that assumption, but on the interpreta-

[106] 80 Cong. Rec. 10002-10003.

tion urged by petitioners that the entire United States or any portion thereof is a "locality" and that the Secretary of Labor may determine a wage for an industry throughout the United States, or in any such portion, no "administrative problem" would have been presented in the case inquired about by Mr. Healey's colleague.[107]

To suggest, therefore, as do petitioners (Br., p. 124-125), that Representative Healey did not entertain the view that a "locality" is a small geographical area [108] is tantamount to accusing him of evasiveness and bad faith towards his colleague. This is particularly true when it is recalled that Representative Greenwood, in urging adoption of the rule for the debate which Representative Healey controlled, had thrice told the House that such was the case. We refuse to place Representative Healey in that position.

Representative Sirovich, of New York, whose remarks are quoted and relied on by petitioners (see Appendix to Pet. Br., p. 23), showed the same understanding as all the previous speakers with

[107] The administrative problem presented would have been that of dealing with one of those uncommon borderline cases that arise in connection with the administration of almost every law. If investigation by the Secretary had confirmed that there were no similar industries, similar work, etc., in the community in question, the Secretary would have been obliged to accept as the prevailing minimum wage the minimum wage paid by the plant in question.

[108] That Representative Healey entertained this view is further shown by the fact that, in answer to a question, he indicated that prevailing wages would be determined for the "general locality" (as a county) of "a small point * * * in northeastern Iowa * * * a town of 4,500". 80 Cong. Rec. 10023. Petitioners (Br. 124) do not dispose of the significance of this colloquy by merely stating that it "lend[s] no support" to our position.

respect to the purpose of the legislation to apply the basic principle of the Bacon-Davis Act. He stated:

> "The Walsh-Healey Bill makes it mandatory for all agencies that deal with the United States Government to adopt the prevailing wages in the respective localities in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract. * * *[109]
>
> "The minimum wage law in this bill can fix wages, depending upon what the *local community* in that particular section where the contract is taken pays for similar work. * * *"[110]

The foregoing extracts from the debates confirm, beyond peradventure of doubt, that the term "locality", as employed in the statute, is used in its commonly accepted sense, that is to say, as synonymous with "community".

Petitioners' arguments that this Court must refuse to consider these statements in the debates is, we believe, without basis in law or common sense. They argue that none of the representatives making such statements, except Representative Healey, were persons "in charge of or sponsoring the legislation" within the rule that "where the meaning of legislation is doubtful or obscure, resort may be had in its interpretation * * * to exposition of the bill on the floor of Congress by those in charge of or sponsoring the legislation * * *".[111] They fur-

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[109] 80 Cong. Rec. 10012.

[110] 80 Cong. Rec. 10015.

[111] Mr. Justice Brandeis in *Wright* v. *Vinton Branch*, 300 U. S. 440, 463.

ther argue that nothing said by Representative Healey shows that the term "locality", as used in the Act, means "community".

To this contention there are several answers, each of which is conclusive:

1. Representative Healey's remarks do show that the term "locality", as used in the statute, means "community".

2. Entirely aside from the remarks of Representative Healey, however, three of the other speakers were persons sponsoring or in charge of the legislation.

Representative Greenwood was the member of and spokesman for the Rules Committee without whose permission the bill could not have come to the floor. He introduced the rule authorizing consideration of the bill and limiting debate upon it. He was the majority member in charge of that debate and explained the terms and purposes of the bill, in urging adoption of the rule in question.

Representative Walter, of Pennsylvania, was not only a member of the Judiciary Committee, as indicated by petitioners (Pet. Br. p. 125), but was a member of the subcommittee which held the hearings on the bill. Moreover, he was one of the three spokesmen, in addition to Representative Healey, who, under the terms of the rule for limited debate "to be controlled by the chairman and ranking minority member of the Committee on the Judiciary," [112] were permitted to explain the terms of the bill and speak in its favor.

Representative Citron, of Connecticut, occupied exactly the same status as Representative Walter, except that the former, though not a member of

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[112] 80 Cong. Rec. 9991-9992.

the subcommittee of the Committee of the Judiciary which had held the hearings on the bill, was nevertheless constantly in attendance during such hearings and participated actively therein.

3. Regardless of this, however, it cannot successfully be gainsaid that the statements of Representatives Walter, Citron, Greenwood, Cooper and Sirovich, all made during the course of a short debate, show a general and common understanding that one of the most important purposes of the legislation was to apply to the Government supply contracts affected the basic principle of the Bacon-Davis Act that the contractor should pay his employees a wage prevailing in the community in which the work was to be done.[113] Accordingly, this Court is entitled to look to such statements as evidence of the purpose of the Congress in enacting the statute.

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[113] Petitioners rely on certain remarks of Representative Michener with regard to the meaning of the term "locality" as it is used in the Act (Br., pp. 126-127). He was a member of the minority and opposed to the Walsh-Healey bill, more especially the wage and hour provisions thereof. He conceded that it was a "milk-and-water proposition when compared with the Walsh bill" (80 Cong. Rec. Pt. 10 (74th Cong., 2d Sess.), p. 10005), for which it had been substituted in the House, and he feared that, if the bill should pass the House, the Senate would refuse to concur in the substitution and the Walsh bill, or its equivalent, would be resubstituted for it in conference. He was, therefore, diligent to point out what he conceived to be dangers in the bill, and it is not surprising that he should have seen the danger that the term "locality" might be misconstrued, as indeed it has been. He himself was under no misapprehension as to the proper meaning of that term, because in his remarks made on the floor of the House shortly after the remarks which petitioners quote he said (*ibid.*, p. 10006): "I am a great believer in *local* government and in *local* responsibility. Leave to the *locality* everything that is possible and *local* responsibility

D. The Secretary's construction of the Act and the Determination based thereon are in the teeth of the Congressional intent and give rise to the very evils that it was the Congressional purpose to avoid.

The legislative history of the Act thus clearly confirms that the interpretation placed upon it by the court below is correct and that that interpretation, and only that interpretation, can effectuate the Congressional purpose in passing the Act. Such legislative history further shows that by the construction which the Secretary of Labor places upon the Act, and which petitioners here seek to support, the Secretary of Labor is deliberately attempting to usurp powers which Congress purposely withheld from her in passing the Act. As is amply demonstrated by the record in the instant case, such a construction will lead to the very results which those who so vigorously opposed the original Walsh bill and the succeeding Healey bill feared and which Congress sought to avert in substituting the provisions of the Walsh-Healey Act for the provisions of the Healey bill.

Under the construction contended for by petitioners the Act would confer upon the Secretary of Labor practically unlimited power to alter in her uncontrolled discretion the prevailing wage structure of industries throughout the country; to eliminate long prevailing wage differentials among localities in the country; and generally to dictate according to her own ideas of economy and social

in that *community* will as a rule do the job" (Italics ours). His insistence that further limitations should be included in the bill was prophetic, but it does not show that there was any real disagreement in Congress as to the proper meaning of the term "locality".

justice the wage rates that shall be paid by those who contract for Government work within the scope of the Act.

In short, petitioners' construction of the Act would change it from a prevailing wage statute to a wage fixing statute. Nor is that radical departure from the Congressional intent the only harm that can result from this attempted usurpation of power. There is good reason to believe that, if the Secretary of Labor shall persist in disregarding the plain terms of the Act by attempting to impose upon Government contractors minimum wage rates in excess of those which prevail in their localities and are paid pursuant to collective bargaining agreements, many of such contractors will find themselves unable to continue to compete for Government business and competition for Government contracts within the scope of the Act will be seriously curtailed and Government procurement seriously impeded.[114]

It does not require penetrating analysis to discern who will first bear the blow. Unless the present usurpation of power be checked and the Act cease to be administered so that "the prevailing minimum wages found" are "shaped primarily by the large integrated operations of the larger companies" (R. 205), the future in Government business of smaller, local industry is indeed insecure.

[114] As Captain C. W. Fisher, of the Construction Corps of the United States Navy, testified on May 13, 1939, at a hearing before the Senate Committee on Education and Labor on S. 1032 (76th Cong., 1st Sess.): "The minimum-wage determination in the iron and steel industry practically eliminated competition in the industry while it was in effect. * * * Bidding is now normal due to the temporary injunction suspending this wage determination." [Hearing on S. 1032, 76th Cong., 1st Sess., p. 40]

IV

There has concededly been no consistent administrative interpretation of the Act, and the mere fact that results consistent in their illegality with those reached in the Determination were also reached prior thereto through a concededly improper interpretation of the statute affords no justification for the changed, but equally improper, interpretation adopted in the Determination.

Petitioners complain that the court below was "grossly in error" in rejecting their contentions (a) that the statute has received a consistent administrative construction, and (b) that the interpretation thereof on which the Determination was predicated should, therefore, be sustained (Br., pp. 128-131). They seem to feel particularly grieved that the court below considered that the construction of the statute urged by them herein was first adopted in the Determination itself, exactly forty days prior to the commencement of suit by respondents.

The facts with respect to this charge of "gross error" are as follows:

Commencing with the first wage determination under the Act, "*In the Matter of Determination of Prevailing Minimum Wages in the Men's Work Clothing Industry*," 2 Fed. Reg. 233, made on January 30, 1937, and thereafter to the date of the Determination, the Act was "construed" by the Secretary and, quite naturally, by her subordinates in the Department of Labor, as follows: The words "currently operating in the locality" etc. were held to modify only the words "groups of

industries" in that portion of Section 1(b) of the Act requiring contractors to pay their employees

> "* * * not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular of similar industries or groups of industries currently operating in the locality in which the * * * supplies * * * are to be manufactured or furnished under said contract * * * *."[1]

On the basis of this "interpretation", paralleled in legal annals only by such remarkable feats of statutory construction as that performed by the Gilbertian Chancellor, the Secretary proceeded to make a series of wage determinations in which she determined "prevailing minimum wages" in various industries either for the entire United States,—as was generally the case,—or, at most, in three great geographical divisions thereof.[2] Contrary to the statement made at page 129 of petitioners' brief, the Secretary never even purported

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[1] In the determination cited in the text, the Secretary stated (at p. 234 of 2 Fed. Reg.): "In this connection the Department has had the assistance of an opinion of the Solicitor of Labor, rendered at my request, in which the phrase 'currently operating in the locality', as used in section 1 (b) of the Public Contracts Act, is construed. The Solicitor has advised me that in his opinion the phrase in question limits or modifies only the phrase 'groups of industries', and in no way affects the clause 'persons employed * * * in the particular or similar industries'."

[2] *In the Matter of Determination of Prevailing Minimum Wages in the Dimension Granite Industry*, 2 Fed. Reg. 2976 (Dec. 22, 1937).

to determine wages in "localities" in any of such cases.

Such "interpretation" was, in form, abandoned in the Determination, presumably because it was conceived that it was hopeless further to deny that the authority of the Secretary of Labor under the Act was limited in all cases to the determination of prevailing minimum wages in "localities".[3] In any event, it is now admitted that "it is apparent that the more recent interpretation of the Secretary better comports with the statutory language" (Br., p. 131): and, regardless of any concession, it is manifest that such earlier "interpretation", which petitioners now make no effort to defend, was altogether improper.

To the date of such changed "interpretation" of the statute, even the Secretary of Labor had apparently understood that a "locality" was a small geographical area.[4] Indeed, the desire not to be hampered in her wage fixing activities by a mere statutory requirement that wages be determined only in "localities" had, no doubt, furnished the motivation for her earlier "construction" of the Act.

However, as soon as it was admitted that the Secretary's power did not extend beyond "localities", that term was forthwith expanded in the Determination to encompass either the entire United States or any region thereof deemed appropriate by the Secretary. This was to obtain "re-

[3] This contention was strongly pressed by the steel companies, including respondents (R. 237), during the argument preceding the Determination.

[4] See "The Prevailing Minimum Wage Standard", O. R. Strackbein, member of the Public Contracts Board, at pp. 70-71, quoted at p. 43, *supra*.

sults" "wholly consistent" with those obtained under the earlier "construction" (see Br., p. 131; Pet. Cert., p. 17, note 5). Thus, by the simple process of "construction" the term "locality" was excised from the statute for the second time.

We believe that the court below was thoroughly justified in holding that the interpetation of the statute urged upon it, and urged here, has not been one consistently adhered to; but, on the contrary, had been adopted for the first time in the Determination. We believe, also, that the Determination was disingenuous in its implication that the construction of the term "locality" adopted therein had theretofore been consistently followed, (R. 245),—a disingenuity likewise characteristic of petitioners' brief in the District Court (see p. 10, *supra*).

But regardless of this, the construction of the statute, if consistent, has been consistently wrong. As such, it is of no avail to petitioners herein.[5]

The only real element of consistency in the administration of this statute by the Secretary of Labor and her subordinates is to be found in their consistent effort to flout the Congressional purpose and to usurp power not confered by the statute. We believe that the following extract from the book recently written by a member of the Public Contracts Board typifies the spirit, fostered by the Secretary, with which the Act has been administered.

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[5] *Houghton* v. *Payne*, 194 U. S. 88, 100; *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U. S. 315, 330-331; *Brewster* v. *Gage*, 280 U. S. 327, 336; *Swendig* v. *Washington Water Power Co.*, 265 U. S. 322, 331; *Louisville & Nashville R. R.* v. *United States*, 282 U. S. 740, 757, 759; *Texas & Pacific Ry.* v. *United States*, 289 U. S. 627, 640; *United States* v. *Tanner*, 147 U. S. 661.

> "Does the Public Contracts Act make mandatory the determination of prevailing minimum wages by localities? If so, the interpretation made by the Department of Labor was in error. But assuming that the locality-standard was intended by Congress, it may still be questionable whether the locality is the proper geographical unit for the wage determination in view of the object of the Act. If the Department of Labor's interpretation contravened the clear meaning of the statute, is the Department's interpretation more suited to attainment of the law's object than the allegedly clear wording of the Act?" [6]

And we further believe that the following inadvertent statement by that gentleman, appointed by the Secretary of Labor to assist in the administration of the Act, subject to her control, explains fully the reason why the Secretary of Labor has consistently violated the command of the statute:

> "Of course, it is possible that the interpreter might have had in mind a standard different from the one specified in the statute; and then made his interpretation gratuitously in order to shape the statute to his own predilection." (*ibid.*, p. 35)

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[6] See "The Prevailing Minimum Wage Standard", *supra*, at p. 34.

V.

The construction of the Act for which petitioners contend would render the administration of the Act much more difficult than that for which respondents contend.

Petitioners argue that, in determining whether the construction of the word "locality" for which respondents contend accords with the Congressional intent, the Court should consider the administrative difficulties which petitioners claim would result from such a construction (Br., pp. 132-134).

As the court below quite properly said, considerations of administrative convenience do not constitute any reason for "disregarding the clearly expressed intention of Congress" (R. 393). Since we have already shown that the construction for which petitioners contend is clearly contrary to the intention of Congress as expressed in the Act and as shown by its legislative history, the fact that such construction may cause difficulty and inconvenience in the administration of the Act is entirely irrelevant.

However that may be, the fact is that the construction of the Act for which petitioners contend and on which the Determination is based would render the Act much more difficult of administration than the construction for which respondents contend.

Petitioners claim that under the latter construction it will be necessary for the Secretary of Labor to determine the prevailing minimum wages for each of the thousands of local centers of manufacture throughout the country. They concede, what

is in fact shown by the record in this case, that the task would not present serious difficulty even in an industry which is as widespread as the iron and steel industry. They cite as a "horrible example", however, the flour industry with 2,193 flour mills, which they say are located in 1,129 of the 2,053 counties in the country (Br., pp. 120 and 133-134).

According to the Report of the Public Contracts Board in the instant case, wage data were received from 234 of the 461 plants "considered to be within the purview of the industry", and the reporting plants accounted for "approximately 85 per cent of the nation's capacity to produce pig iron, 90 per cent of the steel ingot capacity, and 90 per cent of the capacity to produce hot rolled products". The Board further stated, "We have no doubt as to the sufficiency of the wage data in the record to give us an adequate view of the number of workers employed in the industry, the number being paid the various base rates, and the various base rates in the industry". (R. 117)

All of such data were furnished voluntarily and the record before the Board (including the filing of numerous briefs) was completed within a period of 42 days after July 11, 1938, the date of the notice of the hearing before the Board. The iron and steel industry is the largest industry for which the Secretary of Labor has yet undertaken to determine prevailing minimum wages under the Act and the record shows that the task of determining such prevailing minimum wages by "localities", as respondents contend that term should be construed, does not present any serious administrative difficulties. It may fairly be assumed that in citing the flour industry petitioners selected the worst possi-

ble example, and yet the task of determining prevailing minimum wages in 2,193 flour mills is nothing to what the Works Progress Administration has undertaken and accomplished in determining prevailing wages for various classifications of labor in communities throughout the country.

Whatever may be the burden that would be imposed on the Secretary of Labor by respondents' construction of the statute, however, it is far less than that which the Secretary seeks to assume by her construction. Since the real effect of petitioners' construction is to read the term "locality" out of the Act, it was to be expected that they would not offer any alternative definition of that term. They do say that, "Since there are as many possible places of performance of a supply contract as there are different bidders for the contract, in advance of the award of such a contract the 'locality in which the materials * * * are to be manufactured * * *' is *prima facie* as broad as the area within which all of the possible bidders are located." (Br., p. 117). They assert, however, that "even in cases where manufacturers are diffused throughout the nation, it does not follow that the locality determined by the Secretary must be the entire nation." (Br., p. 121). As they point out, transportation costs "may limit the effective marketing area" and other economic characteristics "may reveal fairly well-defined competitive areas within the industry" (Br., p. 121). They also express concern over the "runaway shop" evil and assert that the effective "elimination of the competitive advantages of this practice can only be accomplished by making it unprofitable for industry to migrate solely for the purpose of achieving low wage costs." (Br., p. 119).

Thus, under the construction which petitioners seek to place on the Act, the Secretary of Labor must collect minimum wage data for all places at which plants in the industry in question are located, because "*prima facie*" the area within which all of the possible bidders are located must be taken into account, which is not less than she would be required to do under respondents' construction of the Act. Beyond that, however, under petitioners' construction of the Act, in order to determine the extent of those "fairly well-defined competitive areas within the industry" for which the prevailing minimum wage shall be determined, the Secretary must collect a great amount of additional data as to transportation costs, marketing areas, sources of raw materials, possibilities of migration from high wage areas to low wage areas and all the other economic characteristics of the industry which necessarily bear upon the question as to the extent of the respective regions within which the respective minimum wage rates should prevail.

As the record shows, neither the Public Contracts Board nor the Secretary of Labor made any attempt to collect such data in the instant case.[1] On the basis of the criteria offered by petitioners in support of their construction of the Act, therefore, the present Determination is clearly arbitrary and capricious, and it may fairly be said that petitioners' contention that their construction of the Act will present less administrative difficulty than the construction urged by respondents can only be supported on the assumption that the Sec-

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[1] On the contrary, respondents' application to reopen the hearing and furnish data of that character was denied (R. 31-32, 20-21, 218-230).

retary of Labor will in each case arbitrarily determine the extent of the respective "localities" in which to establish uniform minimum wages without regard to the numerous economic factors which petitioners claim require their construction in order to effectuate the purposes of the Act.

The difficulties involved in supporting a determination under petitioners' construction of the Act are well illustrated in petitioners' attempt to support the instant Determination by an analysis of the bidding on 72 Government steel contracts (Br., pp. 144-152). In spite of the fact that such analysis shows on its face that a great deal of time was devoted to its preparation, it now appears that it was so inaccurate that petitioners have revised it and, in doing so, have found it necessary to eliminate over one-fifth of such contracts. And yet any attempt by the Department of Labor to ascertain with any degree of accuracy the nature and effect of the great diversity of economic factors which determine the extent of the areas within which prospective bidders on Government contracts may effectively compete for those contracts would be fraught with infinitely greater difficulties than those which were encountered in the preparation of that analysis.

The contention that respondents' construction of the Act must be rejected because of the administrative difficulties which it would involve is thus without foundation in fact. Petitioners' construction would present even greater administrative difficulties, unless indeed it be assumed that the Secretary of Labor would arbitrarily determine the extent of the "localities" within which the minimum wages shall prevail, as the Acting Secretary

actually did in this case and as the Secretary has apparently done in the ten determinations which have become effective since March 27, 1939, the date of the injunction in this case, copies of which determinations have been filed with the Court by petitioners.

VI

Even if the Act were construed to authorize the Secretary of Labor to determine prevailing minimum wages in an area as large as the Thirteen State Area, in cases in which the relevant economic facts made such a determination necessary or appropriate to carry out the purposes of the Act, as so construed, the Determination would nevertheless be beyond the authority of the Secretary, since utterly arbitrary and in the teeth of the statute.

It is well settled that the power or discretion vested in an officer by statute may not be exercised by him in an arbitrary or capricious manner (see pp. 231-237, *infra*). Any such action is, in a true sense, beyond the authority of the officer, for the reason that the law never confers an authority to act arbitrarily or capriciously (*ibid.*). This is apparently conceded by petitioners (Br., p. 152). While arguing that the Act authorizes the determination of prevailing minimum wages in areas as large or larger than the Thirteen State Area, they nevertheless admit that in delimiting the areas within which to determine such wages it is the "duty" of the Secretary "to reach a reasonable judgment based upon" relevant considerations (*ibid.*).

It is our contention that even if the Act be construed to permit, in a proper case,[1] the determination of prevailing minimum wages in an area as large as the Thirteen State Area, the decision in

[1] That is, a case in which the relevant economic facts make a determination for such a large geographical area necessary or appropriate to carry out the purposes of the Act, as so construed.

the Determination to establish a uniform minimum wage for the Iron and Steel Industry in the Thirteen State Area was utterly unreasonable, arbitrary and, indeed, in the very teeth of the statute, as so construed.

We predicate this argument upon the Determination itself, which states the reason for such action, and upon the facts found therein and in the Report of the Public Contracts Board relied on in the Determination. No question is presented in this case as to the sufficiency of the evidence to support any such finding, or otherwise, as petitioners seem to imply (Br., pp. 139, 144 *et seq.*).

In judging of the validity of such action, this Court is, of course, entitled to consider in its context the reason given therefor as aforesaid, even if (as we believe not to be the case [2]) the Secretary is not required by the statute to accord a hearing, or find facts, or explain her action. As stated by Mr. Justice Holmes in *Gegiow* v. *Uhl*, 239 U. S. 3, 9: [3]

> "The courts are not forbidden by the statute to consider whether the reasons *when they are given*, agree with the requirements of the Act. * * * And when the record shows that a Commissioner of Immigration is exceeding his power, the alien may demand his release * * * ." (Italics ours.)

Apparently recognizing the vulnerability of the Determination, petitioners, in their brief as originally filed, argued, in substance (pp. 142-143), that, regardless of whether it could reasonably be

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[2] See pp. 193-210, *infra*.

[3] This case and other like cases are discussed in greater detail at pp. 170-171, *infra*.

justified by what was said or found, therein or in the Report, it "would be valid if *any* state of facts reasonably *could be conceived* that would sustain it."[4] Pursuing this theory, petitioners, in effect, asked the Court to take judicial notice of various alleged facts with respect to the bidding upon, and award of, 72 Government iron and steel contracts, awarded during the period from January 1, 1938, to June 30, 1938. What were thought to be summaries of certain data with respect thereto were served on counsel for respondents, and the major portion of the argument in petitioners' brief devoted to attempted justification of the Determination, as well as various maps illustrating such argument, were based on such material. (See Br., pp. 147-152.)

Upon checking such data as to 9 out of the 72 contracts covered thereby, counsel for respondents discovered numerous errors in such data, which were brought to the attention of counsel for petitioners, who thereupon advised counsel for respondents that at the oral argument counsel for petitioners would request that the part of their brief relating to such contracts be not considered by this Court. Petitioners have since filed with the Court a Supplemental Statement, a copy of which was received by counsel for respondents on Saturday, March 30, 1940. Since counsel have not yet received any copy of the data covered by such Supplemental Statement, however, they have been unable to make any check thereof other than to

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[4] This argument is without foundation, as hereinafter shown (see pp. 236-238, *infra*). But even if valid in theory, it would be of no avail to petitioners herein, since in the light of the admitted facts, there is no basis which could reasonably be conceived to sustain the Determination.

note that such Statement eliminates from consideration 16 of the 72 contracts which were considered in petitioners' brief and that such Statement still includes at least one of the contracts the data with respect to which were found to be erroneous by counsel for respondents.

Respondents believe that the data contained in such Statement are not relevant on any of the issues in this case. Even if such data were relevant on any of such issues, however, respondents submit that, in view of the facts above set forth, such Statement should not be considered by this Court.

The only purpose of such Statement appears to be to show that bidders for the contracts considered therein were widely scattered and that, therefore, in order to accomplish the purpose of the wage provisions of the Act, it is necessary for the Secretary to prescribe minimum wages thereunder for large areas or regions. As we have pointed out elsewhere (*supra*, pp. 60-63), the assumption upon which such argument is based is contrary to the express provisions of the Act.

The Determination must, therefore, stand on its own feet.

We consider first the facts in the light of which the Determination was made.

A. The Determination seeks to establish a uniform minimum wage in the Thirteen State Area notwithstanding the facts, *inter alia*,

(1) that wage differentials of long standing, based on differing economic conditions, exist between various major regions therein in which iron and steel are manufactured;

(2) that the iron and steel industry is not a sweatshop industry and the minimum

wages paid therein in each of such regions are high wages; and

(3) that such differentials have existed for many years without endangering in any way the wage standards in the western regions in which higher wages have been paid.

Even if consideration be given only to large regions within the Thirteen State Area,[5] the wage data in the Report of the Public Contracts Board (R. 63-74; see also R. 255-258), upon which the Secretary relied in making the Determination (R. 314), show conclusively the existence of well-defined wage differentials between iron and steel plants located in the western portion (which includes Pittsburgh and is herein sometimes called the Western District[6]) of such area and those plants which were included by the Secretary in said area but which are also located in what are known in the industry as the "Eastern District", the "Buffalo District" and the "Johnstown District".

A description of such districts is set forth in the Statement (p. 18, Note 36). It will be recalled that the Eastern District includes the entire area of the United States east of Altoona, Pa., and north of Virginia, that portion of Maryland west of the Altoona line, and certain counties of West Virginia. The plants of all respondents are located in the Eastern District.

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[5] Analysis of the wage data set forth in the Report will also show differentials existing between various communities and districts in such large regions. See Appendix X and R. 255-258.

[6] See Statement, p. 18, and particularly Note 36 thereto.

The above-mentioned differentials are shown in the table set forth at pages 19 and 20 of the Statement and are reflected in Appendix X.

To summarize:

In *the Eastern District*, out of a total of 5,389 common laborers, 5,057 are paid at the rate of 56½ cents per hour or less, 194 are paid at the rate of 57c and only 138 are paid a wage in excess of such rate. Out of a total of 53,531 wage earners in the Eastern District, 45,729 are employed at plants in which the base rate of pay for common laborers is 56½ cents per hour or less, 4,005 are employed at plants at which such base rate is 57c, and only 3,797 are employed in plants in which such base rate is in excess of 57c.

Only three plants (out of 58) in the Eastern District, employing 115 common laborers and a total of 3,602 wage earners, pay common laborers as much as 62½ cents an hour.

In *the Buffalo District*, out of a total of 982 common laborers, 171 are paid at the rate of 55 cents an hour or less, 715 are paid at the rate of 59½ cents an hour and the remaining 96 are paid at the rate of 60 cents an hour. Out of a total of 10,879 wage earners in the Buffalo District, 1,412 are employed at plants in which the base rate of pay for common laborers is 55 cents per hour or less, 8,611 are employed at plants in which such base rate is 59½ cents, while the remainder are employed in a plant in which such base rate is 60 cents an hour.

In *the Johnstown District*, all the 603 common laborers are paid at the rate of 58½ cents per hour.

But, in *the Western District*, out of a total of 11,483 common laborers, 10,561 are paid at the

rate of 62½ cents an hour, and, out of a total of 155,755 wage earners, 149,319 are employed at plants in which the base rate of pay for common laborers is exactly 62½ cents an hour.

Thus, out of a total of 10,676 common laborers in the four districts paid at the rate of 62½ cents an hour, 10,561 are in the Western District. Out of a total of 6,262 common laborers paid at the rate of 57 cents an hour or less, 5,251 are in the Eastern District.

Mere examination of the wage data set forth above is sufficient to demonstrate that the wages paid in the iron and steel industry in each of such districts are relatively high wages,—particularly when it is borne in mind that the wages paid to the vast majority of the wage earners are higher than the base rates listed (R. 58). The steel industry is notoriously not a sweatshop industry (R. 215).

As hereinafter shown, the Department of Labor itself, in its numerous periodic surveys of rates of wages in the steel industry, has long recognized the existence of a geographic differential between the Pittsburgh District and the district east thereof in the area in question, and has also recognized that it arose from industrial conditions and not from the mere whims of the statistician.

The most recent description of such districts is contained in Bulletin No. R-380 (Reprint from Monthly Labor Review for April, 1936) of the Department of Labor which reads as follows: (at p. 3):

> "The Eastern District embraces the New England States, as well as a strip of territory along the Atlantic coast, including Mary-

land. More specifically, it covers plants in Massachusetts, Rhode Island, Connecticut, eastern New York, New Jersey, eastern Pennsylvania, and those located in and around Baltimore. The Pittsburgh District includes western Pennsylvania, eastern Ohio and the northernmost corner of West Virginia. Thus, plants in Pennsylvania, west of Altoona, as well as those along the borderline of Ohio from Youngstown south to Bellaire, Ohio, and those located in the panhandle of West Virginia, have been placed in this district."

Eloquent testimony as to the long continued existence of the differential between such districts is found in the following compilation from United States Bureau of Labor Statistics Bulletin (No. 513, Table 4, No. 567, Table 6 and No. 403, Table 3) of the average hourly earnings (in cents per hour) of common laborers in specified departments of the Iron and Steel Industry:

Year	*Eastern*	*Pittsburgh*	*Year*	*Eastern*	*Pittsburgh*
1907	13.4	15.4	1919	39.8	48.0
1908	12.0	15.6	1920	45.1	53.0
1909	12.3	15.2	1922	32.2	36.0
1910	14.2	16.4	1924	38.6	45.1
1911	14.1	16.6	1926	37.4	45.2
1912	14.4	16.7	1929	37.5	45.3
1913	15.7	19.0	1931	35.1	45.9
1914	15.6	19.0	1933	29.1	35.8
1915	15.5	19.0	1935	41.4	46.6
1917	27.8	30.1			

The Bureau has stated that the differential between such districts arose because of "industrial conditions" (Bulletin No. 567, December, 1932, p. 17); and that each "has its own peculiarities" (Serial No. R. 380, p. 3).

It is, of course, obvious, from the long continued existence of such differential,—and the fact that it exists because of differing economic conditions, —that the lower wages paid in the Eastern District in no way endanger the wage standard in the Western District.

At certain points in petitioners' brief (see, e. g., Br., p. 117), it is implied that, because of such wage differential, respondents or other manufacturers of iron and steel whose plants are situated in the Eastern District enjoy a "decisive competitive advantage" in bidding on Government contracts over those manufacturers located in the Western District. Consequently, it is implied that a uniform wage should be paid by manufacturers in both Districts in order that the wage standard in the Western District may not be impaired.

These implied suggestions have no basis in fact. They ignore the differences in industrial conditions in the two areas and the fact that the differential has existed for many years.

In this connection, we cannot emphasize too strongly that neither the Acting Secretary, nor the majority of the Public Contracts Board, made any finding that the wages paid by respondents, or any other manufacturers located in the Eastern District, conferred any competitive advantage, "decisive" or otherwise, in bidding on Government contracts. On the contrary, the minority of the Board stated,—and this statement was not challenged by either the Secretary or the majority,— that "no * * * showing has been made" that "these lower wage rates * * * confer a competitive advantage in bidding on Government contracts upon

the companies operating in the eastern area" (R. 214). The minority further stated,—and such statement was likewise unchallenged,—that "the forcible merging of the eastern with the western section would introduce a reallocation * * * with the effect that an unearned and gratuitous advantage would be given to one area at the expense of another." (R. 215)

While we do not believe that anything contained in petitioners' Supplemental Statement is relevant to the real issues in this case, it is worthy of note in this connection that, of the 39 contracts dealt with in the maps which are included in such Statement, 20 appear to have been awarded to bidders in localities in the Western District where the 62½ cent minimum wage rate predominates, although in the case of each of such contracts there were bids from one or more bidders in localities in the Eastern District where the minimum wage rate is 56½ cents or less. Two of such contracts were awarded to bidders in the Western District in cases in which there were no bidders from the Eastern District, and only 8 of such contracts were awarded to bidders in the Eastern District in competition with bidders in the Western District.

Petitioners, of course, did not submit such maps to show that steel manufacturers in the Eastern District do not enjoy any competitive advantage by reason of the prevailing wage differentials between localities in that District and localities in the Western District. Such maps, however, negative the existence of any such advantage and confirm the conclusions of the minority of the Public Contracts Board in that regard. Although re-

spondents have not been furnished with the data on which such maps are based and have not, therefore, had an opportunity to check such data, they believe that on this point at least the maps fairly reflect the facts.

As petitioners indicate in such Supplemental Statement (p. 6), the data therein set forth were submitted for the purpose of showing that "the Congressional objective of rewarding rather than penalizing the high minimum wage manufacturer can only be accomplished by the determination of the uniform minimum wage prevailing throughout an area in which it is realistically possible to say that the 'materials * * * are to be manfactured' and within which the payment of less than the uniform minimum standard may attract the place of actual performance away from the fair minimum wage standard employer".

The maps cover only a selected group of contracts and do not cover all the contracts for iron and steel products which were awarded during the six months period referred to in such Statement. It is not to be presumed, however, that the contracts were selected with a view to disproving the contention of petitioners and it is, therefore, to be expected that a complete analysis of all such contracts awarded during such period would even more decisively negative such contention.

We turn now to a consideration of the basis on which the Acting Secretary determined to disrupt the economic balance in the Thirteen State Area.

B. The only reason given in the Determination for the establishment of a uniform minimum wage in the Thirteen State Area is, in the light of the admitted facts, a palpably insufficient justification for such action.

In the Determination the single reason given,—i.e., the sole "economic fact" relied on,—to justify the establishment of a uniform wage in a "locality" consisting of the Thirteen State Area, is the following (R. 250):

> "The remaining states [i. e., the states and political subdivisions in the Thirteen State Area] * * * fall within *the great market dominated by Pittsburgh.* It has been urged both at the hearing before the Board and in the subsequent proceedings in this matter that the western portion of the state of Pennsylvania does not fall within the same locality as the eastern portion of the state and a finding of various different localities has been urged. *Yet the entire eastern market,* frequently referred to in the industry as the Pittsburgh district, *would seem to constitute a single locality,* both in terms of geography and *in terms of the markets predominantly served by the producing plants.*" [Italics ours.]

Presumably, the intended significance of this statement was that the manufacturers in the Thirteen State Area would be likely to compete with each other for the same Government contracts.

To accept this reason, standing alone as it does, as a valid reason for the determination of a uniform wage in the Thirteen State Area, would be to hold that the purpose of the Act is to require all manufacturers, wherever located and however different the conditions under which they may operate, to pay the same minimum wage if they are to bid on the same Government contract.

That such is not the purpose of the statute appears on its face; nor have petitioners adduced an iota of evidence that the Congress had any such intent. Indeed the Determination itself recognizes, in other connections, that such was not the purpose of the Act.

Thus, in selecting the areas embraced in four[7] of the other five so-called "localities" found by him in the Determination to be appropriate units for determining minimum wages, the Acting Secretary purported to recognize existing geographical wage differentials (R. 249; 247; 248). And, in the case of at least two of such "localities",[8] which adjoined, no consideration whatever was given to the question as to where the manufacturers therein marketed their products or with whom they competed (R. 248-250).

The explanation for the attempt in the Determination to establish a uniform wage for all iron and steel manufacturers in the Thirteen State Area is really very simple. The Secretary desired to raise the wages in 55 of the 58 plants in the east. Fulfillment of the Secretary's desires in this regard, however, was not one of the objects sought to be attained by the Act.

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[7] The so-called "trans-Mississippi locality"; the so-called "southern area"; the three west "coastal states"; and the eight "mountain states".

[8] The so-called "trans-Mississippi locality"; the states in the area "immediately to the East" thereof.

VII.

The Determination was not based on the fair and impartial hearing required by the Act.

As hereinafter shown (Point IX) the Act requires that wage determinations be based on fair and impartial hearings. Such a hearing was not accorded in this case.

The only document (other than the Report) referred to in the Determination was a report allegedly made to an annual meeting of stockholders of United States Steel Corporation (R. 31; 246). No such report was introduced in evidence during the hearings leading up to the Determination (R. 31).

The Acting Secretary apparently based his conclusion that the only "great market" east of Chicago was that dominated by the plants in the Pittsburgh District, either in whole or in part, upon a statement purportedly made in such annual report. Thus the only justification given by the Acting Secretary for his decision that 13 States, a portion of another, and the District of Columbia constitute a "locality" was based on matter not properly before him.

It is well established that consideration of material matter outside the record in an administrative proceeding invalidates the administrative action taken on the basis thereof (*United States and Interstate Commerce Commission* v. *Abilene & Southern Ry. Co., et al.*, 265 U. S. 274, 289, 290).

Consequently, even if the Determination were otherwise unassailable (as it is not), it would be invalid because of such unlawful action by the Secretary.

PART TWO—PROCEDURAL QUESTIONS

VIII.

Respondents' right to bid and negotiate for Government contracts and to conduct their business relations with the Government free from illegal interference has been unlawfully invaded, and is threatened with further unlawful invasion, by the unlawful action of petitioners. Consequently, they have standing to sue to protect such right and such business relations.

The primary contention of petitioners (Br., p. 18) is that, no matter how unlawful their action and threatened action, no matter how grievous the abuse of power by the petitioners, and no matter how great the resulting damage to respondents in the conduct of their businesses, relief may not be accorded by the courts in this suit, or in any other, for the reason, *inter alia*, that respondents do not have any right or privilege which the courts can protect against the threatened injury.[1]

The court below, in rejecting this contention (R. 397-400), followed the consistent course charted by the decisions of this and other courts.

A. Respondents have the right, apart from any statutory privilege, to bid and negotiate for Government contracts free from unprivileged and unlawful interference of Government officers acting in excess of their authority, and the decision of the court below that such right has been unlawfully invaded is correct.

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[1] If such contention were sustained, the courts would, of course, be powerless in the face of a "determination" that the prevailing minimum wages in the iron and steel industry are $10 an hour in a "locality" comprising the entire United States.

1. Apart from any statute, respondents have the right to be free from illegal interference in the legitimate conduct of their businesses, including the sale of their products to the Government.

The right asserted by respondents is the right to bid and negotiate for contracts with the United States, subject only to conditions imposed or authorized to be imposed by Congress and free from unlawful interference by third parties, including public officers acting outside the scope of their authority.

Such right is only one phase of the right of every person to conduct a legitimate business,—pursue a legitimate calling,—and in the conduct thereof to seek to sell the products or services of that business, free from unjustifiable interference, restraint or coercion by others. The law has sedulously protected that right for centuries.[2]

The Government has been a customer for many years of all respondents save one, and, at the date of institution of suit, was not only a party to contracts with several, but an important and active prospective customer of all.[3] Petitioners (who,

[2] *Tarleton* v. *McGawley*, Peake's M. P. 205, 170 Eng. Rep. 153 (K. B., 1793). A specific application of the general principle was stated by the American Law Institute in Section 766 of the Restatement of Torts (1939):

"Except as stated in Section 698, one who, without a privilege to do so, induces or otherwise purposely causes a third person not to

"(a) perform a contract with another, or

"(b) enter into or continue a business relation with another

is liable to the other for the harm caused hereby."

Section 698 states that one who alienates the affections of, or has sexual relations with, a person under contract to marry does not thereby become liable to the other party to the contract.

[3] See pages, *supra*.

like all public officers acting beyond their lawful authority, were acting as individuals [4] and, therefore, as third parties *vis-a-vis* respondents and the Government) threatened without justification to destroy respondents' right to bid for and negotiate contracts with that customer subject only to conditions imposed or authorized by it (i. e., by Congress, whose province it is to authorize or impose such conditions as it sees fit.[5])

Illustrative of the cases establishing that the courts will not hesitate to grant relief against acts of public officers outside the scope of their statutory authority which interefere with business relations with customers [6] is that of *Pierce* v. *Society*

[4] See cases collected pp., , *infra*.

[5] *Heim* v. *McCall*, 239 U. S. 175; *Ellis* v. *United States*, 206 U. S. 246; *Atkin* v. *Kansas*, 191 U. S. 207; and *Campbell* v. *City of New York*, 244 N. Y. 317, 155 N. E. 628, cited by petitioners (Br., p. 20), support only this proposition, which we do not, of course, dispute.

[6] The right to be free from unprivileged or unjustified interference with business relations is, of course, protected against others than public officers. See, e.g., *Emack* v. *Kane*, 34 Fed. 46 (Cir. Ct., N. D. Ill.); *Price-Hollister Co.* v. *Warford Corporation*, 18 Fed. (2d) 129 (D. C., N. D. Okla.); *American Mercury Co., Inc.*, v. *Chase*, 13 Fed. (2d) 224 (D. C., Mass.); *Graham* v. *Street Railroad Co.*, 47 La. Ann. 1656, 18 So. 707; *Sparks* v. *McCreary*, 156 Ala. 382, 47 So. 332; *Loewe* v. *Lawlor*, 208 U. S. 274; *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418; *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229; *Duplex Co.* v. *Deering*, 254 U. S. 443; and *Truax* v. *Corrigan*, 257 U. S. 312. Such criticism as has been directed at the decisions in the five cases last cited (and similar decisions involving labor boycotts, etc.) has not been on the ground that the plaintiffs therein did not have any legal rights entitled to protection, but has been based on the theory that the conduct of the defendants therein was justifiable or privileged because of their self-interest. No such basis of privilege or justification is in issue in this case, since public officers sued for injunctive or declaratory relief may justify their action only by authority of law.

of Sisters, 268 U. S. 510. In that case, two private schools sought to enjoin the Governor and other officials of the State of Oregon from threatening or attempting to enforce the so-called Compulsory Education Act. That Act (which was to become effective more than a year after the case was decided by this Court) required every parent, guardian or other person having control or custody of a child between eight and sixteen years of age to send him to a public school for the period in each year during which a public school should be held in the district where the child resided, and failure to do so was made a misdemeanor. The plaintiffs contended that the statute in question was unconstitutional because it deprived the parents of their right to choose schools for their children and by reason of the unlawful interference with the free choice of schools by "patrons, present and prospective," of the plaintiffs, it deprived the plaintiffs of their property in their school business.

In affirming decrees granting preliminary injunctions against the enforcement of such statute, this Court said, in part (at pp. 534-536):

> "Appellees are corporations and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. *Northwestern Life Ins. Co.* v. *Riggs*, 203 U. S. 243, 255; *Western Turf Association* v. *Greenberg*, 204 U. S. 359, 363. But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compul-

sion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action. *Truax* v. *Raich*, 239 U. S. 33; *Truax* v. *Corrigan*, 257 U. S. 312; *Terrace* v. *Thompson*, 263 U. S. 197.

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"Generally, it is entirely true, as urged by counsel, that no person in any business has such an interest in *possible* customers as to enable him to restrain exercise of proper power of the State upon the ground that he will be deprived of patronage. But the injunctions here sought are not against the exercise of any *proper* power. Appellees asked protection against arbitrary, unreasonable and unlawful interference with their patrons and the consequent destruction of their business and property. Their interest is clear and immediate, within the rule approved in *Truax* v. *Raich*, *Truax* v. *Corrigan* and *Terrace* v. *Thompson*, *supra*, and many other cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers. *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229; *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443; *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184; *Nebraska District* v. *McKelvie*, 262 U. S. 404; *Truax* v. *Corrigan*, *supra*, and cases there cited.

"The suits were not premature. The injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective

date of the Act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well recognized function of courts of equity."

In *Truax* v. *Raich*, 239 U. S. 33, suit for an injunction was brought by an alien employee against a State Attorney General and a County Attorney to restrain them from enforcing criminal provisions of a statute against his employer. The statute made the employment of more than a certain percentage of aliens criminally punishable and in the particular case the defendant officers would have enforced the Act and so would have compelled the discharge of the plaintiff. The defendants contended, among other things, that the plaintiff was not entitled to sue for the relief asked, because (his employment not being for a term) he had no enforceable right to compel his employer to continue to employ him.

In holding that the statute was unconstitutional and that the employee had an interest sufficient to invoke equity jurisdiction to restrain enforcement thereof against the employer, this Court said (pp. 37-38):

"It is also settled that while a court of equity, generally speaking, has 'no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors' (*In re Sawyer*, 124 U. S. 200, 210), a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property. [Citing cases.] *The right to earn a livelihood and to*

continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law. It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn is too broad. *The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will.* [Citing cases.] It is further urged that the complainant cannot sue save to redress his own grievance (*McCabe* v. *Atchison, Topeka & Santa Fe Ry.*, 235 U. S. 151, 162); that the servant cannot complain for the master, and that it is the master who is subject to prosecuton, and not the complainant. But the act undertakes to operate directly upon the employment of aliens, and if enforced would compel the employer to discharge a sufficient number of his employes to bring the alien quota within the prescribed limit. * * * " [Italics ours.]

In *Pratt Food Co.* v. *Bird*, 148 Mich. 631, 112 N. W. 701, the plaintiff, a manufacturer of prepared foods for poultry and cattle, sought to enjoin the Dairy and Food Commissioner of Michigan from issuing to the trade a circular stating that the plaintiff's product was subject to the provisions of a Michigan statute which required

that any "concentrated commercial feeding stuff" should be labeled in a specified manner and accompanied by a chemical analysis of the product, and indicating that dealers purchasing and selling the plaintiff's product would be required to comply with such statute in respect thereof.

The Michigan Supreme Court affirmed the action of the lower court in dismissing the bill on the ground that the action of the Dairy and Food Commissioner was within his authority under the statute, after first holding that the court had jurisdiction of the action.

The Court said, in part (112 N. W. at 703):

> "* * * If the acts which are threatened are unlawful, *it cannot be doubted that placing in the hands of every dealer in the state a bulletin which in effect threatens them with prosecution* in case they make use of these products in the form in which they are lawfully sold to them, *would be to absolutely exclude complainant's business from the state.* The case presented is very similar in this aspect to that of *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, * * *"[1] [Italics ours.]

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[1] To the same effect, see *State* v. *District Court*, 17 N. D. 285, 115 N. W. 675, in which case the Supreme Court of North Dakota vacated a temporary writ of prohibition which it had issued directing the District Court to quash an injunction issued by the latter enjoining the Commissioner and Chemist under the North Dakota Pure Food Law from issuing circulars or bulletins condemning the plaintiff's flour as adulterated and from seizing such flour and instituting criminal proceedings against the plaintiff; and *Crescent Mfg. Co.* v. *Mickle*, 216 Fed. 246 (D. C. Ore.), in which case

The foregoing cases and many others[8] make it abundantly clear that respondents have the right to bid and negotiate for contracts with the Government subject only to conditions imposed, or authorized to be imposed, by Congress, and free from the unlawful interference of third parties, including public officers acting outside the scope of their authority.

The rights of respondents in this case are even more plainly invaded by the unlawful interference of the petitioners than were the rights of the plaintiffs in most of the cases cited above. In such cases the action complained of, which constituted the unlawful interference, operated only indirectly on the plaintiffs by inducing or tending to induce their prospective customers not to deal with them.

The acts of petitioners in this case, however, affect the respondents not only indirectly by inducing their customer (i. e., the Government) not to deal with them except upon conditions not authorized by law, but also operate directly against the respondents by requiring that, if they wish to have their bids considered, they must include the unlawful conditions therein. In this aspect of the case, the respondents are placed upon what might

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the court enjoined the Dairy and Food Commissioner of Oregon from issuing a ruling barring the plaintiff's baking powder from that State.

[8] Among the cases which might be cited are *Terrace* v. *Thompson*, 263 U. S. 197; *Scully* v. *Bird*, 209 U. S. 481, cited with approval in *Tennessee Electric Power Co.* v. *T. V. A.*, 306 U. S. 118, 137-138; *State* v. *District Court*, 17 N. D. 285, 115 N. W. 675; *Crescent Mfg. Co.* v. *Mickle*, 216 Fed. 246 (D. C., Ore.); and *Roe* v. *Lundstrom*, 89 Utah 520, 57 Pac. (2d) 1128.

be termed a "conditional black list" in that they are prevented from submitting a meaningful bid unless it contains the unlawful conditions.[9]

The right asserted by respondents (the right to bid and negotiate for Government contracts free from conditions other than those imposed or authorized by Congress) is recognized, affirmed and made more valuable by Section 3709 of the Revised Statutes[10] which, with exceptions not here material, requires competitive bidding, after advertisement, on Government supply contracts, and the award of such contracts to the lowest responsible bidders.[11] That statute, which gives effect to the policy of Congress to encourage free and full competition for Government business, renders the right to be free from unprivileged interference much more valuable[12] than is the right to seek the patronage of private individuals free of such interference, since in the latter case the prospective

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[9] The acts of petitioners affect respondents precisely as they would be affected if they were placed upon the "black list" provided for in Section 3 of the Public Contracts Act. If respondents were placed on that list, they could (as petitioners state they may now) submit bids, with the certainty that they would not be considered. Would petitioners contend that one's rights would not be infringed if he were placed on such "black list" by action in excess of authority? *Cf. Burland Printing Co.* v. *La Guardia*, 9 N. Y. Supp. (2d) 616, wherein the act of a municipal contracting agency in disqualifying a prospective bidder from bidding for future public contracts was enjoined at the suit of such bidder.

[10] 41 U. S. C. § 5.

[11] See pp. 165-167, *infra*; Br., p. 35.

[12] As was pointed out by the Court below (R. 399).

customer may generally decline to deal because of mere whim or caprice.[13]

The Public Contracts Act, superimposed upon R. S., Section 3709, reiterates and makes more explicit the implications of the earlier statute. By that Act, Congress so preempted the field of wage provisions in Government supply contracts as clearly to prohibit Government officers from inserting in such contracts any wage provisions unauthorized by the Act, and the inclusion of any such other provisions is a direct violation of the statutory mandate.

Petitioners, indeed, have conceded (Pet., p. 11) that respondents have a legal right to do business with the Government upon such terms and conditions as *it* may prescribe and free from the "wrongful" or "otherwise unjustifiable" interference of third parties. It seems, moreover, that petitioners also concede (Br., 22-23) that their acts and threatened acts of which respondents complain have in fact interfered with the conduct by respondents of their businesses.

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[13] Petitioners argue (Br., p. 34) that the right to bid for Government contracts "is empty and protection of it futile" unless respondents can compel the award of contracts. Although we believe that that may be done in a proper case (see pp. 178-179, *infra*), we insist that the "mere" right to bid is valuable to respondents. This Court will certainly not presume that the contracting officers of the Government will not comply with the law once the courts have interpreted it. The Court in *Work* v. *Louisiana*, 269 U. S. 250 (see pp. 243-245, *infra*), pointed out that the plaintiff in that case could not compel the Secretary of the Interior to pass favorably upon its claim—yet it was not for an instant thought that the right to have that claim considered in the light of the applicable statutes as correctly interpreted by the Court was for that reason "empty" or protection of it "futile".

They contend, however, first, that they are not "third parties" as between respondents and the Government, and second, that, even if they are such third parties by reason of the fact that they have exceeded (and threaten to exceed) their statutory authority, their interference is nevertheless not wrongful or otherwise unjustifiable.

2. Petitioners, in acting and threatening to act in excess of their statutory authority, are third parties vis-a-vis respondents and the Government, and their interference is not privileged merely by reason of the fact that, if they had not exceeded their statutory authority, they would have been acting as agents of the Government.

Petitioners arrive at the conclusion that, even if they have exceeded their statutory authority, they are nevertheless not third parties as between respondents and the Government by first asserting that their status is the same as that of an agent of a private corporation who has exceeded the latter's instructions. Then, on the assumption that such an agent would not be liable, except to his principal, for his breach of duty, they assert that they similarly are not subject to injunction in this action.

Petitioners' argument essentially is not that they are not "third parties", but that their interference with respondents' businesses is privileged. Petitioners have not argued, nor could they, that they *are* the Government. It is obvious that they are in fact third parties and that the only issue is whether their interference is privileged by reason

of the fact that, if they had not exceeded their authority, they would have been acting as agents of the Government.

Whether the argument of petitioners be considered, however, as a plea of privilege, or as directed, as petitioners consider it to be, to showing that they are not third parties *vis-a-vis* respondents and the Government, petitioners derive no support from their supposed analogy.

A. In the first place, the analogy cannot properly be drawn. Either petitioners are agents of the Government, or they are not. The controlling factor in determining their status is the extent of their statutory jurisdiction and authority. If they act within it, they remain agents of the Government. If they exceed it by attempting to impose upon respondents in their dealings with the Government wage conditions not only not authorized, but forbidden, by Congress, they become private individuals and their acts, shorn of official justification, become the work of strangers to the Government.[15]

B. Even if the analogy were properly drawn (which, as above stated, it is not), it is by no means

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[15] See *Floyd Acceptances*, 7 Wall. 666; *Filor* v. *United States*, 9 Wall. 45; *Hawkins* v. *United States*, 96 U. S. 689; *Ferris* v. *United States*, 28 Ct. Cl. 332, 344-345; *Poindexter* v. *Greenhow*, 114 U. S. 270; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; and other cases cited under Point X, *infra*. *Filor* v. *United States*, *supra*, was a suit upon a lease which had been executed by officers of the United States, without authority to bind it. This Court said (9 Wall. 45, 48): "The agreement or lease was, so far as the Government is concerned, the work of strangers. * * * The officers at Key West did not represent the United States, except in their military capacity, though assuming to do so * * * they acted on their own responsibility."

clear that the agent of a private principal, who, in violation of his principal's instructions, either imposed conditions not desired by his principal or flatly refused to contract with one who desired to sell goods to his principal, would not be liable in tort to the prospective seller. The assumed immunity from liability rests upon the ancient doctrine of privity, which is constantly becoming more limited with the further development of the law.[16] The precise point in question seems to have been expressly left open by the American Law Institute in the Restatement of Agency,[17] and there are decided cases analogous to the one supposed which indicate that liability might be imposed.[18]

[16] In addition to the doctrine of privity, the old law of agency was affected by nebulous distinctions between nonfeasance and misfeasance, and it was generally believed that an agent who violated his duty to his principal was, so far as outsiders were concerned, guilty only of inaction. The modern and more sensible view disregards such distinctions, and the tendency is to say that an agent is guilty of more than mere inaction if his breach of duty consists of having undertaken to perform his duty and in the course thereof having actually invaded the interests of strangers to the agency.

[17] See Restatement of Agency (1933), *Caveat* to § 353 and the following illustration thereto:

"4. P, by mail, directs A, who is in charge of P's business, to sell goods to T at a certain price. Disliking T, A refuses to sell the goods to him and in P's absence T is unable to get the goods. The Restatement of this subject does not state whether or not A is liable to T."

[18] See *Sidney Blumenthal & Co.* v. *United States*, 30 Fed. (2d) 247 (C. C. A. 2d), *cert. den.* 279 U. S. 847; *McGurk* v. *Cronenwett*, 199 Mass. 457, 85 N. E. 576; *Carpenter* v. *Williams*, 41 Ga. App. 685, 154 S. E. 298; *Eastin & Knox* v. *T. & P. Ry. Co.*, 99 Texas 654, 92 S. W. 938; Explanatory Notes to §§ 574-580, Tentative Draft No. 6 (1931) of the Restatement of Agency; and Restatement of Torts (1939) § 766 and Illustrations thereto.

C. Whatever may be the responsibilities of a private agent in such a case, however, petitioners are in error in contending that for the same reason they cannot be enjoined in this suit from taking action in excess of their authority.

Their error lies in the assertion that public officers and private agents are subject to the same principles of law.[19] The fact is, of course, that the courts have always considered that public officers are ordinarily subject to entirely different rules than those applicable to private agents. As this Court has stated (*Hawkins* v. *United States*, 96 U. S. 689, 691):

> "Different rules prevail in respect to the acts and declarations of public agents from those which ordinarily govern in the case of mere private agents."

There are manifold illustrations of this fundamental distinction which petitioners ignore, the

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[19] For this proposition, petitioners cite *Dibble* v. *New Haven*, 56 Conn. 199, 14 Atl. 210, which is not in point. The court therein held that a taxpayer could not restrain an agent of a municipality from letting an unauthorized contract. The ground of decision, however, was that the taxpayer could not show any injury, since an unauthorized contract would not be binding on the municipality, and the remarks of the court quoted by petitioners (Appendix, p. 15) clearly meant only that the court would not enjoin a public agent, any more than it would a private agent, at the behest of one who was not threatened with any injury. The case, far from supporting petitioners' position, really aids respondents, since it seems clearly to imply that, if the plaintiff had shown any injury, the mere fact that the defendants were agents would not have been a defense. As petitioners say (*ibid.*), "the court's reasoning would apply equally to a bidder."

existence of which renders their analogy useless. A few examples will suffice:

(i) A public officer, all of whose acts must be justified by some statute, violates the law where his action, as in this case, is "in the teeth of the statute" and contrary to the statutory mandate (R. 397). A private agent who exceeds his authority does not thereby violate the law, but merely his principal's instructions.

(ii) When a public officer exceeds his authority, he becomes *vis-a-vis* the Government and others, as has been shown above, an individual stripped of his official character and his acts, accordingly, have no official justification and do not bind the Government. When a private agent violates the instructions of his principal, he may nevertheless retain his status as an agent acting within the scope of his apparent authority, and thus bind his principal.

(iii) A public officer may be compelled by mandamus in an appropriate case to perform a ministerial duty imposed upon him by statute, but similar relief would not lie against a private agent to compel performance of a duty imposed upon him by his principal.

Whether, therefore, the analogy relied on by petitioners be considered as supporting a plea of privilege or as directed at showing that petitioners are not "third parties", it is clear that the analogy does not aid them.

3. The court below properly held that the acts of the petitioners were neither privileged nor justified and that, therefore, they constituted wrongful interference with respondents' right to bid for and negotiate contracts with the Government.

Petitioners argue (Br., pp. 21, 26-32) that, conceding that they are third parties who have interfered with respondents in the conduct of their businesses, the interference does not subject them to injunctive or declaratory relief in this action because it is not "unlawful" or "unjustifiable". They base this contention on the premise that acts of third parties do not constitute unlawful or unjustifiable interference with business opportunities unless such acts, considered apart from the relationships with which they interfere, fall within the usual categories of common law torts.

As we have shown, petitioners' acts of interference affect the respondents not only indirectly by inducing their customer (i. e., the Government) not to deal with them except upon conditions not authorized by law, but also operate *directly* against the respondents by requiring that, if they wish to have their bids considered, they must include the unlawful conditions therein. Such acts directly regulate and control the respondents and invade and interfere with their right to conduct their business with the Government free of unlawful interference.

Petitioners are attempting to enforce the invalid Determination against respondents as directly as any public officer attempts to enforce any unauthorized ruling against a complainant in the more

usual type of case. And here, just as in such a case, the sole criterion in determinig whether or not the interference is "unlawful" or "unjustifiable" is not whether the requirements essential to a common law tort are present, but whether the interference is authorized by statute. If not, it will be restrained.[20]

Nor are petitioners, in asserting that the interference to be actionable must fall within the usual categories of common law torts,[21] in any better situation by supposing, as they do, that their acts in enforcing the Determination interfere with respondents' businesses only by tending to induce

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[20] In *Work* v. *Louisiana*, 269 U. S. 250 (pp. 243-245, *infra*), there was no suggestion made that the Secretary of the Interior had acted with malice, fraud, etc. He was enjoined because he was attempting to enforce an invalid ruling in the only way in which enforcement thereof was possible, i.e., by telling the State of Louisiana that its claim would not be considered if it refused to act in accordance with such ruling. The close analogy between that case and the instant one is apparent.

[21] Petitioners rely on the phrase "[right] protected against tortious invasion" used by this Court in *Tennessee Electric Power Co.* v. *T. V. A.*, 306 U. S. 118, 137-8, and imply that the word "tortious" as used therein refers to an act which is tortious at common law in a two party situation. It seems clear, however, that the Court in the phrase quoted was using "tortious" in the broad sense of "unlawful", i.e., as designating an act against which the law protects one. For example, in *Lumley* v. *Gye*, 2 Ell. and Bl. 216, the act of the defendant was not "tortious" in the sense in which the petitioners use that term, but was so in the sense in which it seems this Court used the term in the phrase quoted above. It has been said that the significance of *Lumley* v. *Gye* is in its extension of liability to methods of inducement of breach of contract or refusal to deal which are "non-tortious" as between the defendant and the person induced. See Restatement of Torts (1939), Comment *b* to § 766.

the respondents' customer (i. e., the Government) not to deal with them.

By so asserting, petitioners attempt to confuse the issue by making it seem that the essence of the tort is the injury done to the interests of the person induced. It is perfectly clear, however, that a prospective seller who sues to enjoin interference which tends to induce his prospective customer not to deal with him is not suing to prevent an injury to such customer, but is complaining of an injury to his (the seller's) interest. The essence of the tort is interference, and the manner in which the interference is achieved is important only in so far as it affects the question of privilege.

A clear statement of the correct principles was made by the American Law Institute in the Restatement of Torts (1939): [22]

> "There is no technical requirement as to the kind of conduct that may result in inducement. It may be any conduct which conveys to the third person the actor's desire to influence him not to deal with the other. Thus, it may be a simple request or persuasion which exerts only moral pressure. Or it may be a statement unaccompanied by any specific request but having the same effect as if the re-

[22] § 766, Comment *f*. Comment *d* states the same principle: "* * * The rule stated in this Section applies to any purposeful causation whether by inducement or otherwise. The essential thing is the purpose to cause the result." See also, Explanatory Notes to § 9, Proposed Final Draft No. 6 (1939), Restatement of Torts: "*Prima facie*, a defendant is liable for interference with plaintiff's expectancy of custom even when his interference is merely by persuasion. In the case of a competitor, persuasion is, of course, always privileged. A non-competitor does not fare so well."

quest were specifically made. Or it may be a threat by the actor of physical or economic harm to the third person, or to persons in whose welfare he is interested. * * * "

In an attempt to support their position, petitioners quote (Br., p. 27) from *Union Car Advertising Co., Inc.* v. *Collier*, 263 N. Y. 386, 401, 189 N. E. 403, 409, what they state is "the broadest formulation of liability" in this field. In that case the plaintiff and the defendant were competitors,[23] and the statements of Judge Cardozo quoted by petitioners must be read in the light of that fact.[24] The common law has always sought to foster the conduct of legitimate business, and the courts, because of the social interests involved in fostering competitive enterprise, have held privileged, when done by a competitor in the legitimate defense or promotion of his business, acts which are unprivileged when done by a non-competitor.[25] It is essen-

[23] So also in *Goldman* v. *Hartford Road Building Assn.*, 150 Md. 677, 133 Atl. 843, also relied on by petitioners (Br., p. 28).

[24] Petitioners suggest (Br., p. 28) that in order to enable a prospective seller to enjoin unprivileged interference he must point with some "certainty" to specific contracts which he would receive but for such interference. That suggestion is unsupported by authority. The degree of probability or certainty would be relevant in a suit against an alleged interferor for damages (as was the case of *Union Car Advertising Co., Inc.* v. *Collier;* see *Lewis* v. *Bloedel*, 202 Fed. 7 (C. A. A. 4th), wherein the plaintiff lost a Government contract because a competitor bribed an official) but in a suit for an injunction to prevent injury all that need be shown is that the acts sought to be enjoined will influence or tend to influence the decisions of prospective purchasers.

[25] " * * * Again, A may be privileged to induce B not to deal with C, A's competitor, and be unprivileged to induce him in the same way not to deal with D who is not a competitor." Comment *d* to § 767, Restatement of Torts (1939).

tial to the maintenance of a competitive system that competitors be allowed to attempt to divert trade from each other to themselves, the only limitation being that the attempted diversion must not be by means considered violative of the current legal concepts of "fair competition".[26]

When we depart from the competitive field, however, the concepts in the light of which justification or privilege is determined change. Thus, if a defendant is not a competitor of the plaintiff, his interference may be held unprivileged and he may be enjoined, even though he acts in perfect good faith.[27]

For example, in *American Mercury Company, Inc.*, v. *Chase*, 13 Fed. (2d) 224 (D. C., Mass.), the defendant, Secretary of the Watch and Ward Society, had notified distributors of books and magazines that such Society believed that an issue

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[26] The permissible scope of even a competitor's acts has been and is being increasingly narrowed by the development of new concepts of "unfair competition".

[27] Petitioners state (Br., pp. 30-31) that respondents concede that threats of prosecution or litigation made with the purpose of intimidating a plaintiff's customers are not tortious if done in good faith. The statement made by respondents in their brief in the court below to which petitioners refer was, however, not so unqualified. What respondents said was that such threats were justifiable if made by *competitors* in good faith in the legitimate defense of their business interests and property. See pp. 118-119 of Brief for Appellants in the Court of Appeals. Moreover, petitioners cite (Br., p. 30) *Sparks* v. *McCreary*, 156 Ala. 382, 47 So. 332, and imply that such statement of respondents applied to that case. That case, however, did not involve competitors, and was treated by respondents in their brief in the Court of Appeals (see pp. 119-120 thereof) as a case of a different type than that with regard to which such statement was made.

of the American Mercury violated the law and that distributors would be prosecuted if they sold such issue. The court denied the defendant's motion to dismiss the complaint and granted the plaintiff's motion for a preliminary injunction.[28]

When the defendant is not only a non-competitor of the plaintiff, but is also a public officer charged with exceeding his authority, no question of good faith is even relevant in a suit for an injunction or for declaratory relief.[29]

In *Pierce* v. *Society of Sisters*, 268 U. S. 510 (discussed at pp. 141-144, *supra*), *Truax* v. *Raich*, 239 U. S. 33 (discussed at pp. 144-145, *supra*), and *Terrace* v. *Thompson*, 263 U. S. 197, this Court did not inquire, nor have other courts in similar cases inquired, whether the public officers who were defendants acted "in good faith" in believing that the statutes on which they relied were constitutional or authorized their proposed acts. The issue was simply whether the contemplated action was authorized by law; if not, the defendant was enjoined, provided the other requisites for equitable relief were present.

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[28] In *Graham* v. *St. Charles Street Railway Co.*, 47 La. Ann. 1656, 18 So. 707, the defendant, a foreman of a street railway company, dissuaded employees of such company from trading at the plaintiff's grocery store. He was held liable in damages, his interference not being considered privileged even though apparently motivated by the fact that a tenant of his also ran a grocery store. See also *Morasse* v. *Brochu*, 151 Mass. 567, 25 N. E. 75.

[29] The reason is plain. The acts of public officers "must be justified by some law" (*American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 108) and a defendant "sued as a wrong-doer, who attempts * * * to justify by the authority of the State, * * * [must] produce a law of the State which constitutes * * * a warrant for his act" (*Poindexter* v. *Greenhow*, 114 U. S. 270, 288).

Petitioners' attempt to distinguish such cases by saying (Br., p. 31) that they involved coercion by means of threats to institute criminal prosecutions under unconstitutional statutes or prosecutions for which the statutes provided no bases is fallacious. The essence of the tort in such cases was the interference with the plaintiffs' relations with prospective customers which would result from acts of public officers in excess of their authority—the precise tort of which respondents herein complain.

Alabama Power Co. v. *Ickes*, 302 U. S. 464, and *Tennessee Electric Power Co.* v. *T. V. A.*, 306 U. S. 118, do not hold, as petitioners claim, that coercion, fraud, bad faith, malice, conspiracy or intimidation are essential elements in unjustified or unprivileged interference with business relations. They merely hold that one has no right to be immune from lawful competition,[30] even though such competition may have been made possible by Governmental action which is without either constitutional or statutory warrant.

Respondents do not assert, as intimated by petitioners (Br., p. 29), that respondents have any legal right, as such, to maintain an existing competitive position. Respondents maintain that their legal right to bid and negotiate for Government contracts, subject only to conditions imposed, or authorized to be imposed, by Congress, and free from the unlawful interference of third parties, including public officers acting outside the scope of their authority, has been unlawfully invaded, and

[30] Some language in *Louisiana* v. *McAdoo*, 234 U. S. 627, also cited by petitioners (Br., p. 29), indicates that it is to be explained on the same basis.

is threatened with further unlawful invasion, and they show that they will be driven out of competition for Government business only for the purpose of demonstrating the substantial and irreparable character of the damage which will be inflicted unless such unlawful invasion is arrested. It is, of course, well settled that if one's competitive position is impaired by unlawful invasion of a right, including unjustifiable interference with business relations, one may enjoin such invasion or interference.

Petitioners do not, therefore, advance their argument by citing (Br., p. 29) those two cases or *Edward Hines Trustees* v. *United States*, 263 U. S. 143, and *Sprunt & Son* v. *United States*, 281 U. S. 249, which hold that action by an administrative body not shown to invade any right of the complainant may not be enjoined.[31]

Petitioners further contend (Br., p. 28) that even if the erroneous construction of a statute by a public officer is arbitrary, capricious and malicious, "no tortious liability is thereby created at common law".[32] Admittedly, high public officers cannot be sued for damages for injuries caused by acts of theirs having any proper connection with or rela-

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[31] Compare the *Chicago Junction Case*, 264 U. S. 258, where the action by the administrative body did invade rights of the complainant and also resulted in an impairment of its competitive position. Such action was enjoined.

[32] Petitioners are correct in saying (Br., p. 28) that the mistaken construction of a statute is not "a tort in and of itself". Respondents, however, assert no such proposition of a tort *in vacuo* but complain of acts and threatened acts, taken in excess of authority by reason of a misconstruction of a statute, which invade their legal rights.

tion to their official duties.[33] The reason, of course, is one of public policy—officers might fear to take any action if in so doing they were to run the risk of subjecting their personal estates to liability.

That reason, obviously, is not applicable in a suit for injunction. The distinction is fundamental. In the very case cited by petitioners which held that the Secretary of the Treasury was not liable in damages for injury resulting from his erroneous construction of a tax law,[34] reference is made to a decision of this Court enjoining subordinates of the same Secretary from enforcing the same erroneous construction.[35]

From the foregoing discussion, it is apparent that, apart from any statutory right or privilege, respondents have the right to bid and negotiate for Government contracts subject only to conditions imposed, or authorized to be imposed, by Congress, and free from unlawful interference; that such right has been unlawfully invaded by the unprivileged and unjustified acts of petitioners taken in excess of their statutory authority and jurisdiction; and that, therefore, the decision of the court below that respondents have a standing to sue to enforce such right is manifestly correct.

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[33] *Standard Nut Margarine Co.* v. *Mellon*, 72 Fed. (2d) 557, *cert. den.* 293 U. S. 605; *Cooper* v. *O'Connor*, 105 Fed. (2d) 761; *Fletcher* v. *Wheat*, 100 Fed. (2d) 432, *cert. den.* 307 U. S. 621; *Lang* v. *Wood*, 92 Fed. (2d) 211.

[34] *Standard Nut Margarine Co.* v. *Mellon*, 72 Fed. (2d) 557, *cert. den.* 293 U. S. 557.

[35] *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498.

B. Section 3709, R. S. and the Public Contracts Act not only recognize and affirm the right of respondents to bid and negotiate for Government contracts free from the imposition of conditions not authorized by Congress, but also grant to respondents a statutory right or privilege similar in character which they may properly assert in this action.

The right to bid and negotiate for Government contracts subject only to conditions authorized by Congress and free from unlawful interference by third parties, including Government officers acting outside the scope of their authority, is recognized and affirmed by Section 3709, R. S., and the Public Contracts Act. As we shall show, those statutes are based upon the existence of that right and can achieve their full purpose only if it be *enforced*.

Those statutes, however, go further and actually confer on prospective bidders for Government contracts a statutory right or privilege to bid thereon free from conditions not authorized by such statutes which can be protected in the courts against invasion by Government officers acting in violation of such statutes.

1. Section 3709, R. S., and the Public Contracts Act are part of a statutory scheme which requires that Government supply contracts be awarded, after competitive bidding, to the lowest responsible bidders and which makes it unlawful for a Govment officer to require that there be included in such contracts any provisions, other than those authorized by such statutes, relating to the wages to be paid to employees of Government contractors.

It is the purpose of the various Federal statutes relating to public contracts to insure full and free competition therefor and the award of such contracts after competitive bidding to the lowest responsible bidder.

Although Section 3709, R. S.,[36] does not in terms provide for competitive bidding, it has been consistently interpreted by the courts and the executive departments (as pointed out by petitioners, Br., p. 35) as requiring, with exceptions not here material,[37] competitive bidding, after advertis-

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[36] Set forth at pp. 65-66, *supra*.

[37] § 3709 does not require competitive bidding when immediate delivery or performance is required by the public exigency or when competition is not possible, as in the case of a patented or copyrighted article. Again, practically all Government purchasing officers are permitted by statute to purchase supplies in nominal amounts (generally $50 or $100) without competitive bidding. See 41 U. S. C. § 6. Certain other types of contracts have from time to time been excepted from the operation of § 3709. See, e.g., 10 U. S. C. § 1203 and 34 U. S. C. § 569 (medicinal supplies for the Army and Navy.)

ing,[38] on Government supply contracts, and the award of such contracts to the lowest responsible bidders.[39]

Other Federal statutes, relating to public contracts of specific types and passed in furtherance of the policy of insuring full and free competition, make explicit the requirements of Section 3709, R. S., as interpreted, by specifically providing that such contracts be awarded after competitive bidding to the lowest responsible bidders.[40]

Accordingly, as pointed out in an earlier section of this brief (Point III, A, 1), it has long been settled that, unless specifically empowered so to do by another statute, Federal officials may not impose upon bidders for Government contracts conditions or qualifications requiring conformity to the social, economic or political policies advocated by such officers, but not necessary to protect the United States in connection with the performance of the contracts.[41] The imposition of such conditions or qualifications would manifestly tend to

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[38] The "advertising" may be done in any one or more of several ways: by sending copies of specifications and invitations to bid to a regular list of bidders who usually compete on contracts for the supplies in question; by posting notices in public places, such as postoffice bulletin boards; or by paid advertisements in newspapers.

[39] See *Schneider* v. *United States*, 19 Ct. Cl. 547; *Scott* v. *United States*, 44 Ct. Cl. 524; 19 Op. Atty. Gen. 685; 28 Op. Atty. Gen. 384; 38 Op. Atty. Gen. 555, 557.

[40] See, e.g., 34 U. S. C. § 561, 573 and 575 (Navy contracts for current and foreign supplies and provisions) and 10 U. S. C. § 1200 (supplies for Army Quartermaster Corps).

[41] See Senate Report No. 1157, 74th Cong., 1st Sess., quoted from at p. 67, *supra*; 19 Op. Atty. Gen. 685. See also the decisions of the Comptroller General cited in the next note.

narrow competition and raise the prices required to be paid by the Government for articles or services purchased.

Thus, as also pointed out, in the absence of express statutory authority, an executive department may not lawfully include in invitations for bids on contracts for Government work stipulations requiring the contractor to pay any specified wage rates to employees employed in the performance of the contract.[42]

In this state of the law, Congress passed the Public Contracts Act for the express purpose, *inter alia*, of authorizing contracting officers to insert in Government supply contracts wage provisions which, in the absence of such legislation, could not have been imposed. It must of necessity follow that such officers may not now include in such contracts wage provisions not authorized by that Act.

That conclusion would follow, even if the Act were considered alone, since Congress, by occupying the field of wage provisions in Government contracts and specifying the provision which may be inserted, has by necessary implication excluded the insertion of other or different provisions. When, however, the Act is considered in the framework of Section 3709, R. S. and the accepted interpretation thereof, the conclusion is inescapable.

Indeed, we do not understand that petitioners contend to the contrary.

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[42] 10 Comp. Gen. Dec. 294; 19 Comp. Gen. Dec. 673; see also Senate Report cited in last preceding note.

2. Section 3709, R. S., and the Public Contracts Act confer on respondents an enforceable right or privilege to bid and negotiate for Government contracts free from wage conditions imposed in violation of those statutes.

Petitioners assert that neither Section 3709, R. S., nor the Public Contracts Act confers on respondents a right or privilege which can be enforced in this action to bid and negotiate for Government contracts free from wage conditions imposed in violation of those statutes.

(a) The broad underlying purpose of Section 3709 R. S., and the Public Contracts Act cannot be achieved unless all persons complying with the conditions imposed or authorized to be imposed by Congress have the right or privilege to bid on Government contracts, free of other conditions unlawfully imposed.

As we have said, the broad underlying purpose of the Federal competitive bidding statutes is to insure full and free competition for Government contracts so as to enable the Government to secure its supplies at the lowest price. Even if, as petitioners contend, such statutes were passed chiefly for the benefit of the Government and their object is the protection to the Government that will result from such competition, it is nevertheless equally true that such benefit and protection cannot be achieved, and the entire statutory scheme is futile, unless all persons complying with the conditions imposed or authorized to be imposed by Congress have the right to bid on Government contracts, free of other conditions unlawfully imposed, and the

right to have their bids considered in accordance with the applicable statutes.

When the Public Contracts Act is considered in the light of the background afforded by the previous competitive bidding statutes, it seems evident that Congress intended that all persons who would agree to the wage conditions prescribed by it in the Act should have the right to bid for Government contracts free from the imposition of wage conditions not authorized by the Act.

Furthermore, as has been shown above (pp. 94-95, 101-102, *supra*), the legislative history of the Public Contracts Act shows plainly that Congress intended to confer benefits upon those bidders for Government contracts who would agree to comply with its provisions. It is thus apparent that, even considered independently of the competitive bidding statutes, Congress intended by the Public Contracts Act to confer upon all persons who would agree to the wage conditions prescribed in the Act the right to bid for Government contracts free from wage conditions imposed in violation of the Act.[43]

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[43] This intent to confer benefits upon bidders for Government contracts is not, it seems, peculiar to the Public Contracts Act. In recent years, as Government purchases have become an increasingly significant factor in the nation's economic life, there seems to have been present in other statutes as well an intent to require competitive bidding not only to protect the Government purse but, apart from that, to prevent favoritism. See, e.g., H. Rept. 2060, 73rd Cong., 2d Sess., wherein the House Committee on Military Affairs stated that certain procurement practices of the War Department had "resulted in favoritism and discrimination, which section 3709 of the Revised Statutes and section 10 (t) of the Air Corps Act [Act of July 2, 1926, c. 721, 44 Stat. 780, 788] sought to eradicate by prescribing competitive bidding in the Army Air Corps."

Respondents' position is fully supported by the decisions of this Court which have held that a statute by imposing restrictions on the exercise of a privilege has implicitly recognized and affirmed the right of the person seeking to exercise such privilege to do so free of any other restrictions sought to be imposed by officers acting without authority.

Thus, in *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, it was held that since Congress had specifically defined the conditions upon which the Postmaster General might deprive the plaintiff of the use of the postal facilities the plaintiff was entitled to relief to prevent the Post Office Department from depriving it of the use of such facilities in circumstances not authorized by the statute. The Court said, in part (187 U. S. at 110):

> "In our view of these statutes, the complainants had the legal right, under the general acts of Congress relating to the mails, to have their letters delivered at the post office as directed. *They had violated no law which Congress had passed* * * *. They allege, and it is not difficult to see that the allegation is true, that, if such action (of the defendant) be persisted in, these complainants will be entirely cut off from all mail facilities, and their business will necessarily be greatly injured, if not wholly destroyed, such business being, so far as the laws of Congress are concerned, legitimate and lawful. * * *" [Italics ours.]

So in *Waite* v. *Macy*, 246 U. S. 606, it was held that since Congress had defined the conditions un-

der which tea might be excluded from the United States the plaintiff was entitled to relief against a regulation of the Secretary of the Treasury whereby the plaintiff's tea would have been excluded in circumstances not authorized by the statute.

In neither of the two cases last referred to did the statutes purport to confer upon the plaintiff, or upon any class of persons of which the plaintiff was one, any particular right or privilege. The significant point is that in each case the statute defined the conditions on which Government officials might prohibit the plaintiff from freely exercising the right or privilege which he sought to exercise and that the Court held that he was entitled to relief against the attempt of such officials to prevent him from exercising such right or privilege in a case in which the statute did not authorize such officials so to do.

So in *Gegiow* v. *Uhl*, 239 U. S. 3, it was held that since Congress had defined the conditions under which immigrants might be excluded from the United States by the Commissioner of Immigration the plaintiffs were entitled to relief against an order of the Commissioner which would have excluded them from the United States in circumstances in which the Commissioner was not authorized by Congress so to do. This Court in that case succinctly expressed the underlying principle of this class of cases as follows (239 U. S. at 9): "The statute by enumerating the conditions upon which the allowance to land may be denied, prohibits the denial in other cases." [44]

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[44] To the same effect see *Utah Fuel Co.* v. *Coal Commission*, 306 U. S. 56; *Perkins* v. *Elg*, 307 U. S. 325.

Application of that principle to the facts of this case leads inevitably to the conclusion that respondents have a standing sufficient to entitle them to relief against action by petitioners which will deprive respondents of their right to bid on public supply contracts free from any wage provisions not imposed or authorized by Congress.

Petitioners contend that the decisions of the Federal and State courts establish that Section 3709, R. S., and the Public Contracts Act do not confer the right which we assert. The question, however, is at least an open one in this Court and although the cases in other courts are in conflict, it would appear that the weight of authority, as well as principle, supports the respondents' position.

Section 3709, R. S., has been before this Court in only two cases, neither of which involved the question in issue here, but the opinions in which contain dicta which are indicative of the view of this Court.

United States v. *Purcell Envelope Co.*, 249 U. S. 313, the earlier of the two cases, involved an appeal from a judgment of the Court of Claims awarding damages for breach of contract by the United States. After the plaintiff's bid had been accepted, but before a formal contract was signed, a successor Postmaster General canceled the award. In holding that a contract had come into existence when the plaintiff's bid was accepted and he was notified that the contract had been awarded to him, and that the successor Postmaster General had no discretion to cancel the contract, the Court said (249 U. S. at 318):

> "There must be a point of time at which discretion is exhausted. The procedure for the advertising for bids for supplies or services to the Government would else be a mockery—a procedure, we may say, that is not permissive but required (§ 3709, Rev. Stats.). *By it the Government is given the benefit of the competition of the market and each bidder is given a chance for a bargain.* It is a provision, therefore, in the interest of both Government and bidder, *necessarily giving rights to both* and placing obligations on both. And it is not out of place to say that the Government should be animated by a justice as anxious to consider the rights of the bidder as to insist upon its own." [Italics ours.]

Although the language above quoted was not necessary to the decision, it is significant in that it shows that this Court recognized that Section 3709, even considered apart from any other statute, gives bidders a chance for a bargain and gives them that chance in order that the Government may get the benefit of full competition.

And if, as the Court stated, Section 3709, R. S., confers upon bidders the right to bid, certainly it can be asserted with equal or greater propriety that Section 3709 and the Public Contracts Act, which was enacted by Congress for the purpose of encouraging bidders, confer upon them the right to bid free of conditions imposed in violation of those statutes.

Petitioners attempt to dismiss the statements quoted above by arguing (Br., p. 36) that they mean only that after a contract is awarded the bidder becomes a contractor and can sue in the Court of Claims. But Section 3709 is not necessary

for that result. That section does not authorize the making of any contract, but merely requires competitive bidding and the award of public contracts to the lowest responsible bidder.

The second of the two cases to which we have referred is *American Smelting & Refining Co.* v. *United States*, 259 U. S. 75, which was also an appeal from the Court of Claims. The plaintiff, which had supplied materials to the United States, claimed that it was entitled to recover the price fixed for payment of materials supplied under wartime requisition orders, whereas the United States claimed that such materials had been supplied under a contract which provided for a lesser price. The plaintiffs maintained that the contract was invalid, because it had not been made after advertising and there had not been any public exigency requiring immediate delivery so as to avoid the necessity of advertising. Mr. Justice Holmes, writing for the Court, summarily disposed of that contention (259 U. S. at 78):

> "We may lay the latter objection on one side. There can be no question that the war created a public exigency and it would be going far to deny that the contract was for a delivery as immediate as was practicable for the subject matter. Moreover, the statutory requirements were for the protection of the United States, not of the *seller*. *United States* v. *New York & Porto Rico Steamship Co.*, 239 U. S. 88, 36 Sup. Ct. 41, 60 L. Ed. 161." [45] [Italics ours.]

[45] The case cited by the court held that a contractor could not defend a suit for breach of contract on the ground that the contract was not in writing and signed by both parties as provided in R. S., § 3744.

The statement by Mr. Justice Holmes that the requirements for advertising are "for the protection of the United States, not of the seller" was a dictum, but it seems to have been a considered one. It was clearly a correct statement when considered in the light of the case before the Court, since one who obtains a contract without competitive bidding should certainly not be heard to complain of the omission. It is one thing, however, to say that the requirements for competitive bidding are not for the protection of a "seller" and a different thing entirely to say that they are not for the protection of a prospective bidder. We do not believe that Mr. Justice Holmes, who had concurred three years before in the opinion in the *Purcell* case, intended to say, or thought that he was saying, the latter thing.[46]

Petitioners cite (Br., p. 37) four cases in lower Federal courts[47] as authority for the statement that upon the few occasions when Section 3709,

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[46] The *New York & Porto Rico* case cited by Mr. Justice Holmes bears this out. That case held (see preceding note) that one who had made, by correspondence, an informal agreement with the Government could not, having breached the agreement for one reason, defend a suit for damages on the ground that a statute required the contract to be in writing and signed by both parties. This Court (in an opinion by Mr. Justice Holmes) held that such statute was a statute of frauds for the benefit of the United States. It seems clear, however, that a bidder would not be in the same position as a seller, i. e., it seems that a bidder would be entitled to refuse to enter upon performance of a contract which the contracting officer refused to put into writing and sign as required by a statute.

[47] *O'Brien* v. *Carney*, 6 F. Supp. 761 (D. C., Mass.); *B. F. Cummins Co.* v. *Burleson*, 40 App. D. C., 500; *Champion C. P. Co.* v. *Joint Comm. on Printing*, 47 App. D. C. 141; *cf. Strong* v. *United States*, 6 Ct. Cl. 135.

R. S. (or any similar Federal statute), has been before the courts, it has been uniformly held or stated that it gives no standing to bidders to attack the award of contracts. Relying on those cases, petitioners contend that Section 3709 and the Public Contracts Act do not confer the right which respondents assert, or any other right.

One of such cases [48] was an attempt by a bidder to mandamus the award of a contract after the contracting officer had, in the exercise of the discretion given him by the applicable statute, rejected *all* bids.

Another of such cases [49] held that an unsuccessful bidder for contracts to be awarded on the basis of "cheapness and efficiency" (and who apparently was not the lowest responsible bidder) could not enjoin the execution of contracts which had been awarded to other bidders. The Court first decided the case on the merits, and then held that the plaintiff (who sued solely in the capacity of a Federal taxpayer having no special interest) had no standing to maintain the action.

Another of such cases [50] held that one who submitted a bid on a contract did not acquire a contract merely because he was the lowest bidder. The contracting officer, after receiving bids, did not award the contract to any one and the plaintiff attempted to sustain the obviously unsound proposition that a failure to reject his bid constituted an acceptance thereof so as to form a contract.

In the fourth of such cases [51] the Massachusetts

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[48] *Champion C. P. Co.* v. *Joint Comm. on Printing*, 47 App. D. C. 141.

[49] *B. F. Cummins Co.* v. *Burleson*, 40 App. D. C. 500.

[50] *Strong* v. *United States*, 6 Ct. Cl. 135.

[51] *O'Brien* v. *Carney*, 6 F. Supp. 761 (D. C. Mass.)

District Court refused to enjoin the performance of a contract theretofore awarded, and to mandamus its re-award, at the instance of a low bidder who claimed that he was responsible.

It is clear that the first three of the above-mentioned cases relied on by petitioners have nothing whatever to do with this case. The fourth case, at least, involved one of the two statutes on which respondents rely, but it is evident that it is not authority for the proposition that the lowest responsible bidder cannot compel the award of a contract to himself, in a case not involving the exercise of discretion by a contracting officer as to a bidder's responsibility,[52] or as to the advisability of rejecting all bids, or otherwise.

(b) The weight of authority of the decisions under state and local competitive bidding statutes supports respondents' contention.

Petitioners, however, do not rely solely upon the decisions of the Federal courts under Section 3709, R. S., to establish that neither that Act nor the Public Contracts Act gives bidders any right to compel the award of contracts. They also contend that "the great majority of the decisions" under state and local competitive bidding statutes are to that effect.

Petitioners themselves recognize (Br., p. 39) that a number of such decisions are irrelevant, because the suits in which they were rendered were

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[52] "The necessity of selecting a responsible bidder imports into the ministerial act an element of discretion to determine whether the lowest bidder is qualified to carry out his contract . . . the 'term responsible means something more than pecuniary ability; it includes also judgment, skill, ability, capacity and integrity.'". *O'Brien* v. *Carney*, 6 F. Supp. 761, 762.

merely attempts by disappointed bidders to have the courts reverse decisions made by contracting officers in the exercise of their judgment and discretion as to which bids should be accepted. The remainder of such decisions, moreover, are not to the effect cited by petitioners.

The courts in seven jurisdictions have expressly held that the lowest responsible bidder may by mandamus compel the award of a contract,[53] and in four other States the courts have considered such cases on the merits without discussion of the jurisdictional question.[54] In only seven States,

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[53] *Bransfield Co.* v. *Kingery*, 283 Ill. App. 405; *State* v. *Louisiana State Board of Agric. & Imm.*, 122 La. 677, 48 So. 148; *State* v. *Corwin*, 52 Neb. 25, 71 N. W. 961; *State* v. *Board of Control*, 122 Neb. 897, 240 N. W. 557; *Araneo-White Constr. Co.* v. *Joint Mun. Sewer Comm.*, 9 N. J. Misc. 243, 154 Atl. 313; *State* v. *Building Comm.*, 125 Ohio 301, 181 N. E. 129; *Baldwin* v. *Colegrove*, 45 Dauph. (Pa.) 430; *Marshall Co.* v. *Bigelow*, 29 Haw. 48. *Commonwealth* v. *Mitchell*, 82 Pa. St. 343, the 1876 Pennsylvania Supreme Court case cited by petitioners (Appendix, p. 12) is contrary to *Baldwin* v. *Colegrove*, the 1938 Dauphin County case cited *supra* in this note; the opinion in the later case, however, is so well reasoned and the court of such importance (it has State wide jurisdiction of actions against State officials) that it seems to counsel for respondents to represent the present law in Pennsylvania.

[54] *Stanley-Taylor Co.* v. *Supervisors of San Francisco*, 135 Cal. 486, 67 Pac. 783; *Neal Publishing Co.* v. *Rolph*, 169 Cal. 190, 198, 146 Pac. 659; *Dixon-Paul Printing Co.* v. *Board of Public Contracts*, 117 Miss. 83, 77 So. 908; *Tribune Co.* v. *Barnes*, 7 N. D. 591, 75 N. W. 904; *Free Press Assn.* v. *Nichols, et al.*, 45 Vt. 7, wherein the court said, as petitioners state (Appendix, p. 19), that the principal object of the law was to benefit the State, but also said that one of its purposes was "to protect those who might bid for the work against favoritism of those whose duty it would be to award the contracts * * *."

however, is it held that such a bidder has no standing to mandamus the award.[55]

In four States[56] such a bidder may enjoin the award of a contract to another bidder,[57] while in four other States actions for such relief have been considered on the merits.[58] In only four States[59]

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[55] *Hanlin* v. *The Ind. District, Etc.*, 66 Ia. 69, 23 N. W. 268; *Bancamerica-Blair Corp.* v. *State Highway Comm.*, 265 Ky. 100, 95 S. W. (2d) 1068; *State ex rel. Johnson* v. *Sevier*, 339 Mo. 483, 98 S. W. (2d) 677; *State ex rel. Stuewe* v. *Hindson*, 44 Mont. 429, 120 Pac. 485, but *cf. State ex rel. Publishing Co.* v. *Smith*, 21 Mont. 46, 52 Pac. 641; *People ex rel. Belden* v. *The Contracting Board*, 27 N. Y. 378; *Matter of Gavaert Co.* v. *Greeff*, 262 N. Y. 651, 188 N. E. 106 (with which *cf., Molloy* v. *City of New Rochelle*, 198 N. Y. 402, 92 N. E. 94); *Times Publishing Co.* v. *Everett*, 9 Wash. 518, 37 Pac. 695; *Bellingham American Publishing Co.* v. *Bellingham Publishing Co.*, 145 Wash. 25, 285 Pac. 836; *Butler* v. *Printing Comm'rs.*, 68 W. Va. 493, 70 S. E. 119.

[56] *Callaghan & Co.* v. *Smith*, 304 Ill. 532, 136 N. E. 748; *St. Landry Lumber Co.* v. *Town of Bunkie*, 155 La. 892, 99 So. 687; *Burland Printing Co.* v. *La Guardia*, 9 N. Y. Supp. (2d) 616; *Weinstein Bldg. Corp.* v. *Scoville*, 141 Misc. 902, 254 N. Y. Supp. 384; *Berry* v. *Tacoma*, 12 Wash. 3, 40 Pac. 414; *Bellingham American Publishing Co.* v. *Bellingham Publishing Co.*, 145 Wash. 25, 258 Pac. 836.

[57] It should be noted that in two of these jurisdictions (New York and Washington) mandamus is refused.

[58] *Mitchell* v. *Walden Motor Co.*, 235 Ala. 34, 177 So. 151; *Hirsch* v. *Mayor and Aldermen of Vicksburg*, 141 Miss. 827, 105 So. 492; *Leininger* v. *Ward*, 126 Okla. 114, 258 Pac. 863; *Higgins* v. *Green*, 56 R. I. 330, 185 Atl. 686.

[59] *Arkansas Democratic Co.* v. *Press Printing Co.*, 57 Ark. 322, 21 S. W. 586; *Peeples v. Byrd*, 98 Ga. 688, 25 S. E. 677; *Kelly, Piet Co.* v. *Mayor and City Council of Baltimore*, 53 Md. 134; *Washburn Lignite Coal Co.* v. *Murphy, et al.*, 54 N. D. 113, 208 N. W. 837.

is it definitely held that the lowest bidder may not maintain an action to enjoin the award.[60]

A most significant feature of the State decisions is that in only one jurisdiction (Missouri)[61] have the courts held without consideration of the merits that a competitive bidding statute confers no rights of any kind upon bidders or prospective bidders. In the other cases in which either mandamus or injunction (to prevent award to another)[62] has been denied the courts have in fact

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[60] In New Jersey unsuccessful bidders may secure review by certiorari proceedings (*Tufano* v. *Borough of Cliffside Park*, 110 N. J. L. 370, 165 Atl. 628; *Paterson Contracting Co.* v. *Hackensack*, 99 N. J. L. 260, 122 Atl. 741). In Colorado prospective bidders, and employees of prospective bidders, have been permitted, without discussion of standing to sue, to maintain declaratory judgment proceedings challenging the validity of wage regulations on public contracts (*Smith-Brooks Printing Co.* v. *Young*, 103 Colo. 199, 85 Pac. (2d) 39; *Denver Bldg. & Const. Trades* v. *Vail*, 103 Colo. 364, 86 Pac. (2d) 267). In Delaware the question as to the rights of bidders is open, as the case cited by petitioners, *Keough* v. *Mayor and Council of Wilmington*, 4 Del. Ch. 491 (Pet. Appendix, p. 12) involved only the question whether the contracting agency could reject all bids and issue new invitations to bid based on different specifications.

[61] *State ex rel. Johnson* v. *Sevier*, 339 Mo. 483, 98 S. W. (2d) 677. In New York, actions for mandamus are summarily dismissed for lack of standing to sue, but prospective bidders may enjoin enforcement of rulings which prevent them from submitting meaningful bids. *Cf. Matter of Gavaert Co.* v. *Greeff*, 262 N. Y. 651, 188 N. E. 106 (mandamus), with *Weinstein Bldg. Corp.* v. *Scoville*, 141 Misc. 902, 254 N. Y. Supp. 384 (contracting agency not allowed to require "pre-qualification" of bidders), and *Burland Printing Co.* v. *LaGuardia*, 9 N. Y. Supp. (2d) 616 (enforcement of "black list" order prohibited).

[62] See cases cited in notes 55 and 59, *supra*.

considered the merits of the particular grievance.[63]

Petitioners rely to some extent on two Federal cases which concerned, respectively, a "low bidder" provision of a city charter [65] and a similar state statute.[64] Both of such cases involved the alleged right to a contract. In the case which petitioners discuss at length (*Colorado Paving Co.* v. *Murphy*, 78 Fed. 28; Br. pp. 40-41), the Circuit Court of Appeals for the Eighth Circuit held that a bidder who alleged that he was the lowest responsible bidder but that the contract had been refused to him because he had offered to furnish "Alcatraz asphalt", a type of asphalt which was equal in quality to other types but which the invitation to bid had "arbitrarily" excluded from consideration, did not have "any such vested right to or interest in the contract" (78 Fed. 28, 30) as to enable him to enjoin its award to another and compel its award to himself.

The decision appears to be correct, for it would seem that a court would really be exercising the discretion vested by law in the contracting officer if it should compel him to enter into a contract for the purchase of a product which he did not

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[63] *Cf.* the following conclusion of the author of the exhaustive annotation of "low bidder" cases in 80 A. L. R. 1282, 1293: "A merely unsuccessful bidder certainly has no contractual right to protect, but it seems to be a fair deduction from the cases as a whole that, upon grounds of public policy mandamus is ordinarily available to such a one to compel the acceptance of his bid for public work where the rejection of the bid, although in the pretended exercise of discretion, clearly appears to have been wholly arbitrary, or fraudulent, and against the interests of the public."

[64] *Colorado Paving Co.* v. *Murphy*, 78 Fed. 28 (C. C. A., 8th).

[65] *United States Wood Preserving Co.* v. *Sundmaker*, 186 Fed. 678 (C. C. A., 6th).

wish to buy. That the decision, however, despite some of the language therein, does not stand even for the proposition that the lowest responsible bidder cannot compel the award of a contract if there is no question as to the discretion of the contracting officer as to the quality of the product,[66] or as to the advisability of rejecting all bids,[67] or otherwise, is clearly shown by the fact that the same court has recently left that very question open.[68].

(c) Respondents do not assert in this case the right to Government contracts if lowest responsible bidders. They do assert the right to submit bids on such contracts without being required to agree, as a condition to having such bids considered, that they will comply with the Determination, which is unlawful and which petitioners are entirely without authority to enforce.

It is apparent from the foregoing summary that the cases under state and local statutes relied on by petitioners do not support their contention that "the great weight of authority" (Br., p. 43) is to the effect that a competitive bidding statute does

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[66] *United States Wood Preserving Co.* v. *Sundmaker*, cited in the last preceding note, involved this question.

[67] In the *Colorado Paving Co.* case, Judge Sanborn seemed to feel, and, it seems, perhaps properly so, that a court should not mandamus the award of a contract if to do so will prevent the contracting officer from exercising his discretion by rejecting all bids.

[68] *Noce* v. *Edward E. Morgan Co.*, 106 Fed. (2d) 746 (C. C. A., 8th), wherein the facts were such as to eliminate any question of discretion, and the question referred to in the text was expressly left open because the plaintiff was not seeking any relief which required that it be decided.

not confer on the lowest responsible bidder the right to a contract in a case in which there is no question of the exercise of discretion by the awarding agency.

Whether or not that contention of petitioners is supported by the authorities is, however, not material in this action, for respondents do not make the claim which petitioners attribute to them. Respondents do *not* assert herein the right to contracts if they are the lowest responsible bidders.

The right that respondents *do* assert herein—a right which they maintain not only exists at common law but is recognized, affirmed and conferred on them by Section 3709, R. S., and the Public Contracts Act—is the right to submit bids on Government supply contracts without being required to agree, as a condition to having such bids considered, that they will comply with the Determination, which is unauthorized by and in violation of the Public Contracts Act and which petitioners are entirely without authority to enforce against respondents.

Petitioners, however, contend (Br., pp. 34, 42) that respondents are claiming not merely that right, but are necessarily asserting a right to the award of contracts because (a) respondents are not prevented by the Determination from bidding, and (b) the mere right to bid "is empty and protection of it futile" unless respondents can compel the award of contracts.

The first suggestion, to which we have already adverted (p. 148, *supra*), is absurd. Petitioners concede that bids will not be considered unless the bidder agrees to comply with the Determination. Accordingly, acquiescence in their first sug-

gestion would indeed make the requirement of competitive bidding a "mockery".[69] As the court below pointed out (R. 400), bidding in the manner petitioners suggest would be but a useless gesture. Petitioners endeavor (Br., p. 42) to distinguish this case from that which would arise if they had "actually prevented the respondents from bidding", but it is too clear for any serious discussion that the imposition of an illegal condition upon the exercise of a right is equivalent to an absolute denial of the right.

Nor is petitioners' second suggestion, to which we have also referred (p. 149, *supra*), of any more weight. This Court will not presume, and it certainly should not be argued here by petitioners, that they will refuse properly to apply the statutes of the United States (including those which require the award of contracts to the lowest responsible bidder) after the law has been interpreted for them by this Court.[70]

The cases relied on by petitioners certainly do not hold that respondents do not have the right which they assert.[71] On the contrary, on the

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[69] *Cf. United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 318.

[70] See *Work* v. *Louisiana*, 269 U. S. 250 (pp. 243-245, *infra*), and *Miguel* v. *McCarl*, 291 U. S. 442, 456. Petitioners themselves, in another portion of their argument (Br., p. 154), contend vigorously that they will apply the law as it shall be laid down by this Court.

[71] Even assuming that the decisions under non-Federal competitive bidding statutes did not affirmatively support respondent's contention, such decisions nevertheless are not authorities against that contention. Those decisions for the most part involved merely the interpretation of competitive bidding statutes in the absence of supplemental statutes relating to the insertion of specific labor provisions in public contracts. But that situation is

occasions in which a situation analogous to that in this case has arisen under competitive bidding statutes, the right has been recognized.[72]

Petitioners, however, state (Br., p. 43) that it would be "a shocking conclusion" if prospective bidders such as respondents should be entitled to the relief sought in this action, although they would not be entitled to compel the actual award of contracts if they should be the lowest responsible bidders. As we have seen (pp. 178-179, *supra*), numerous decisions under State statutes hold that lowest responsible bidders can compel the award of contracts, and there is no conclusive Federal authority to the contrary. Nevertheless, even if respondents could not compel the actual award of contracts if they should be the lowest responsible bidders, their assertion that they are entitled to relief in this action is not so "shocking" as petitioners suggest.

As has previously been shown (pp. 139-147, *supra*), the courts will not hesitate to grant relief against the acts of public officials outside the scope of their statutory authority which interfere with business relations with customers or prospective customers and many of the decisions have been rendered in the face of the precise objection ad-

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entirely different from the one presented here, in that in addition to Section 3709, R. S., Congress has provided in the Public Contracts Act for the insertion in Government contracts of specific labor provisions and has by necessary implication prohibited the insertion of other and different provisions, such as those embodied in the illegal Determination.

[72] *Weinstein Bldg. Corp.* v. *Scoville*, 141 Misc. 902, 254 N. Y. Supp. 384; *Burland Printing Co.* v. *La Guardia*, 9 N. Y. Supp. (2d) 616; *Berry* v. *Tacoma*, 12 Wash. 3, 40 Pac. 414; *Baldwin* v. *Colegrove*, 45 Dauph. (Pa.) 430.

vanced by petitioners herein, namely that the plaintiffs had no judicially cognizable right because they could not have compelled their prospective customers to deal or contract with them.[73] Thus, even if it be assumed that respondents could not compel the award of Government contracts to them, if they were the lowest responsible bidders, it does not follow that they are not entitled to the relief which they seek in this action.

The legislative history of the Public Contracts Act shows (pp. 65-112, *supra*) that, at the time the Act was passed, Congress had in mind that under the pre-existing law any one who desired to bid on a Government contract could do so without making any agreement as to the wages he would pay his employees who would work on the contract if it were awarded to him. The legislative history also shows (pp. 95, 100-101, *supra*) that Congress in passing the Act intended to encourage those employers who would agree to observe the labor standards provided by it in the Act[74] to bid for Government contracts. It is thus entirely consistent to hold, as respondents maintain, that Congress intended that those employers desiring to bid on Government contracts who would agree to the wage provisions authorized by the Act

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[73] See *Truax* v. *Raich* 239 U. S. 33, 38; *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535-536; and Mr. Justice Holmes, dissenting, in *May* v. *Woods*, 172 Mass. 11, 14.

[74] It is this intent, particularly, which distinguishes the situation in this case from that in cases such as *Colorado Paving Co.* v. *Murphy*, p. 181. *supra*. We do not believe that even petitioners would say that the remarks which express the *ratio decidendi* of that case are applicable in this case, namely, that the plaintiff is "a stranger to the statute,—one whose interests were not considered or intended to be considered by its enactment" (78 Fed. 28, 31).

should have the right to the protection of the courts against the unlawful action of Government officers acting entirely without authority and seeking to impose other labor standards, without at the same time holding that Congress intended that the lowest responsible bidder should acquire contractural rights against the United States.[75]

Harlan v. *Employers' Ass'n. of Maryland*, 162 Md. 124, 159 Atl. 267, strongly relied on by petitioners (Br., pp. 18, 49-50), was a suit *against the City of Baltimore* itself,[76] and the court held (162 Md. 124, 132; Br., p. 50) that prospective bidders were not qualified "to maintain a suit *against the City*". [Emphasis ours.]

The *Harlan* case, then, is authority only for

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[75] Petitioners confuse standing to sue with the right to equitable relief by contending (Br., pp. 38, 43) that respondents have no right to protect because, since they are mere prospective bidders, their damages are "speculative". Even considered as bearing on the right to equitable relief, however, petitioners' point is unsound, because where, as here, the essence of the damage sustained or threatened is interference with or loss of an *opportunity* to do business, injunctive relief is particularly appropriate because of the very fact that the exact amount of actual money lost might be extremely difficult of proof in an action at law for damages. Cases such as *Pierce* v. *Society of Sisters*, pp. 141-144, *supra*, where injunctive relief was given because of "an interest in *possible* customers" (268 U. S. 510, 536), make that abundantly clear.

[76] Petitioners state (Br., pp. 18, 49) that the suit was against officers of the City, but, as pointed out above, the court treated it as a suit against the City itself, and there is nothing in the opinion, record or briefs in the case which indicates that any defendants were sued otherwise than in their official capacities.

the proposition that a prospective *seller* may not sue his prospective *buyer* to enjoin him from imposing a condition which the seller insists cannot be legally imposed. There is no need for respondents to dispute that proposition here.

Respondents submit, therefore, that the unauthorized action of petitioners in attempting to give effect to and to enforce against them the Determination constitutes an unlawful and unjustified interference with their right, which exists apart from any statutory privilege, to bid and negotiate for contracts of the United States subject only to conditions imposed or authorized to be imposed by Congress and free from unjustified interference by third parties, including Government officers acting beyond the scope of their authority. That right is recognized and reaffirmed by Section 3709, R. S., and the Public Contracts Act. Those statutes, moreover, considered as part of a statutory scheme and in the light of the purposes for which the latter Act was passed, confer on respondents a statutory right or privilege to bid for contracts of the United States free from the imposition of any conditions (in particular, wage conditions) other than those authorized by Congress to be imposed on the exercise of that privilege.

C. Petitioners' contention that the result of permitting respondents to maintain this action would be seriously obstructive to Government activities which are necessary to its general function is without foundation.

Petitioners present various "highly important practical considerations" which they urge require that respondents be denied the opportunity to resort to the courts to protect themselves against petitioners' illegal action (Br., pp. 61-71).

Petitioners claim that "it has been shown *in fact* they (respondents) are claiming a right to judicial review of the award of Government contracts". The simple answer to that is that it is untrue (see pp. 182-183, *supra*), yet petitioners base their entire argument on this point upon that misconception of respondents' position.

Petitioners then point to a number of statutes in which Congress "has blocked out the broad outlines of policies which are to be followed in the performance of Government contracts, and has placed the duty on Government officers to carry these policies into effect" (Br., pp. 62-63). They assert that under such statutes Government officers must exercise discretion and make many close decisions as to which "it cannot be assumed that in every instance a contracting officer reaches the same conclusion as would a disappointed bidder or as would a court" (Br., p. 64). From that they conclude that if "a single disgruntled merchant, dissatisfied with regulations governing eligibility to bid or obtain an award, may, by invoking the aid of the

courts, tie up or hamper the purchasing activities of the Government, the consequences are likely to be far-reaching and serious" (Br., pp. 70-71).

The argument is too specious to warrant taking the time of this Court to analyze the various statutory provisions to which petitioners refer and to show the extent to which they differ from the provisions here under consideration. Here we are concerned with a patent usurpation of power by the Secretary of Labor in open defiance of a clear statutory mandate. It cannot be so lightly assumed that, if this Court should decide that respondents are entitled to relief against the unauthorized and illegal invasion of their rights by petitioners, the ordinary and legitimate activity of Government officials in the plain discharge of their duties will be entirely disrupted.

To take but one of the examples cited by petitioners, the Public Contracts Act requires the contracting officer to determine whether the contract in question is in an amount over $10,000 (Br., p. 63). If the contracting officer should determine that a contract in the amount of $9,000 was within the statute, he would be doing no more violence to the statutory language than the Secretary of Labor has done in this case. Surely no one can reasonably argue that the courts should refuse to curb such illegal action by Government officials merely because it is asserted that to permit such acts to be

called in question may seriously disturb the activities of Government officials generally.[11]

In so far as the instant case is concerned, it cannot be seriously asserted that the decision of the lower court has in any respect impeded the legitimate purchasing activities of the Government. Quite the contrary; as Captain C. W. Fisher, of the Construction Corps of the United States Navy, testified on May 13, 1939, at a hearing before the Senate Committee on Education and Labor on S. 1032 (76th Congress, 1st Session):

> "The minimum-wage determination in the iron and steel industry practically eliminated competition in the industry while it was in effect. The bidding on steel, while the minimum-wage determination was in effect, was confined to two bidders agreeing to the stipulations, and as only one of these could produce steel within the whole range required, the bidding was limited on some items to one bid. Bidding is now normal due to the temporary court injunction suspending this wage determination." [Hearing on S. 1032, 76th Cong. 1st Ses., p. 40.]

Bulletins Nos. 75 to 176, inclusive, of the Division of Public Contracts of the Department of Labor show that during the 51 week period after March 27, 1939, the date of issuance of the injunc-

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[11] *McCafferty* v. *Glazier*, 10 How. Pr. (N. Y.) 475; and *Riker* v. *Oakland Circuit Judge*, 138 Mich. 181, 101 N. W. 229, cited by petitioners, are not in point. They involved the propriety of granting preliminary injunctions which would have suspended, in one instance, street lighting and in the other, street cleaning. *Bancamerica-Blair Corp.* v. *State Highway Comm.*, 265 Ky. 100, 95 S. W. (2d) 1068, also cited by petitioners, has not the slightest bearing upon the question.

tion by the court below, contracts for iron and steel products subject to the Public Contracts Act were awarded for more than $65,000,000, and that during the 51 week period prior to that date the amount of such contracts awarded was only about $32,000,000.

Petitioners concede that State and municipal taxpayers may compel public officers to comply with competitive bidding statutes.

It is fair to assume that suits by State and municipal taxpayers to compel such compliance would be even more disturbing to the activities of State and municipal governments than actions of the character of the present action, because of the scope of the review by the State courts in such suits.

Yet it has never been thought that taxpayers should be summarily turned out of court on the ground that it would be "very disturbing" (Br., p. 62) to State and local officers to be required to comply with the law. Nor is it, insofar as we know, generally believed that practically every function of States and municipalities has been seriously hampered or crippled (Br., p. 62) by such suits, or that such suits constitute a serious threat to the efficient and flexible functioning (Br., p. 70) of State and local governments, or that the courts in which such suits are brought are overwhelmed by the multitude and complexity of the factual, legal and discretionary problems (Br., p. 67) raised thereby.

The truth is that petitioners' attempt to seek refuge in an argument based on "practical considerations" such as they here advance is the plainest indication of their unwillingness to face the issue on the merits in this case.

IX

Respondents are entitled to have the courts hear their complaint that their rights have been invaded, and are threatened with further invasion, by acts of petitioners which are beyond their statutory jurisdiction and authority and are arbitrary and capricious.

Petitioners contend that the courts may not even inquire whether the acts which respondents allege invade their rights are beyond the statutory authority and jurisdiction of petitioners or are arbitrary and capricious.

That contention is but another effort to avoid a decision on the merits in this case, and the answer to it is twofold: (1) Since Section 5 of the Public Contracts Act plainly contemplates judicial review of determinations of prevailing minimum wages, the legality of the acts of petitioners in making and attempting to enforce the Determination may be challenged in this suit; and (2) irrespective of whether Section 5 of the Act applies to such determinations, general principles of law give respondents the right to question petitioners' jurisdiction and authority to act, and, even conceding *arguendo* the *prima facie* authority, to question whether it has been so exercis[1] as to produce an arbitrary and capricious result.

A. Section 5 of the Act requires that wage determinations, as well as other findings, be made after notice and hearing, and contemplates that such determinations shall be subject to judicial review.

The complete texts of Sections 4 and 5 of the Act

are set forth in Appendix I (pp. 3-4). In so far as here material, they provide as follows:

> "Sec. 4. The Secretary of Labor is hereby authorized and directed to administer the provisions of this Act * * *. The Secretary shall appoint * * * an administrative officer, and such attorneys and experts, and * * * such other employees * * * as he may from time to time find necessary for the administration of this Act. The Secretary of Labor *or his authorized representatives* shall have power to make investigations and findings *as herein provided*, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority * * * to make * * * such rules and regulations as may be necessary to carry out the provisions of this Act.
>
> "Sec. 5. *Upon his own motion* or on application of any person affected by any ruling of any agency of the United States in relation to any *proposal* or contract involving any of the provisions of this Act, and on complaint of a breach or violation of any representation or stipulation as herein provided, the Secretary of Labor, or an impartial representative designated by him, shall *have the power* to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath * * * relating to the matter under investigation or in question; * * * and *shall make findings of fact after notice and hearing*, which findings shall be conclusive upon all agencies of the United States, *and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States;* and the Secretary of Labor or authorized representative shall *have the power, and is hereby*

authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act." [Italics ours.]

Notwithstanding the fact, pointed out by petitioners (Br., pp. 53-54), that there is a typographical error in Section 5[1], it seems to us that the meaning, purpose and functions of Sections 4 and 5 are perfectly clear, and that petitioners' emphasis that Section 5 "is very inartistically drawn" (Br., p. 53) constitutes a studied effort to avoid the plain, but distasteful, meaning of such section by seeking ambiguities.

The purpose and effect of Section 4 are to set up the mechanics and machinery for the administration of the Act by the Department of Labor, and to specify the division of functions permitted thereunder, as between the Secretary of Labor and her subordinates. Thus the first sentence of said section provides that the Act shall be administered by the Secretary of Labor; and the second sentence provides for appointment of necessary administrative personnel. The last sentence confers the power to make rules and regulations necessary to carry out the provisions of the Act. This and the appointive power above referred to may be exercised by the Secretary alone. The third sentence, however, authorizes the Secretary to delegate certain responsibility for the administration of the Act. Either the Secretary, or any representative authorized by him, may make investigations and

[1] The words "the Secretary or his authorized [impartial] representative", which should precede the words "shall make findings of fact, etc.", were obviously omitted through an inadvertence.

findings as provided in the Act, and prosecute necessary inquiries thereunder in any part of the United States.

The authority thus conferred on the Secretary of Labor, or his authorized representative, is the authority only to make investigations and findings as provided in the Act. Various sections of the Act contemplate that investigations will be made for the purposes therein provided. Sections 1 (b), 2, 3 and 6, authorize the *Secretary of Labor* to make findings, including the factual findings as to prevailing minimum wages contemplated by Section 1 (b). The third sentence of Section 4 was necessary in order to make plain that the Secretary herself need not make such findings, but might authorize them to be made by subordinates. Without such provision, it is doubtful that findings, given the effect provided in Section 5, could be made by subordinates.

Section 5 is the procedural section of the Act. It states how the findings authorized to be made by the Act *shall* be made. They are *required* to be made after *"notice and hearing"*,—a requirement highly suitable to important findings authorized to be made by an executive subordinate. When so made, they are to be conclusive upon all agencies of the United States, "and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States."

Petitioners thus show a fundamental misapprehension of the purport of Sections 4 and 5 of the Act when they say that, since Sections 4 and 5 each contain a "grant of * * * power" to make findings, each must authorize findings of different types (see p. 199, *infra*). Section 5 contains no

grant of power to make findings. It merely specifies *how* the findings authorized by the Act to be made by the Secretary, or his representatives, *must* be made. In marked contrast to the command contained therein as to the method by which findings "shall" be made, is the "power" conferred thereby upon the Secretary of Labor or his representatives to hold hearings and take action incident thereto, and to make decisions.[2]

For the reasons stated, therefore, we believe that the statute on its face (a) requires that wage determinations be made only after notice and hearing; (b) provides that such wage findings, when so made *in accordance with* the authority conferred upon the Secretary and her representatives by the Act, are conclusive upon all Federal agencies; but (c) further provides that such wage findings, when subjected to the judicial review to which the Act contemplates such findings may be subject in a proper case, are binding upon the courts only if supported by a preponderance of the evidence.

None of petitioners' arguments to the contrary is tenable.

1. They argue (Br., pp. 54-56, 140) that the language of Section 5 shows that it is limited in its application to hearings and findings in respect of breaches or violations of the representations and stipulations provided for in Section 1 of the Act, which they describe as "quasi-judicial" in character. The particular point made seems to be that the Secretary may hold a hearing either (1) upon

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[2] That this distinction was deliberately drawn is confirmed by the legislative history of Section 5, discussed *infra*.

his own motion, or (2) on application of any person affected by any ruling of any agency of the United States in relation to any *proposal*[3] or contract involving any of the provisions of the Act, but, *in either event, only* (3) on complaint of a breach or violation of a representation or stipulation provided for in Section 1 of the Act.

This argument is predicated on the proposition that the word "and", preceding the words "on complaint of a breach" etc., in the first sentence of Section 5, is employed therein in its conjunctive sense. But it is perfectly plain that the term "and", as so employed, is used in its disjunctive sense to mean "or" or "as well as".[4] Otherwise, the Secretary of Labor would be deprived of authority to hold hearings upon her own motion in respect of any matter arising under the Act; and, specifically, she could not hold such hearings in respect of any ruling of any agency of the character above referred to, or, indeed, in respect of a breach or violation of any representation or stipulation, unless a complaint of such a breach or violation (which might and probably would have nothing to do with the ruling in respect of which she might hold the hearing) happened to be filed with her.

It is astonishing that petitioners should make such contention when the Rules of Practice of the Division of Public Contracts of the Department of Labor itself (Part I, 11 (a)) expressly provide to the contrary, as follows:

[3] A "proposal" is a bid.

[4] Webster's New International Dictionary (2nd Ed., 1939), p. 98:

> "In legal language, *and* is interpreted as if it were *or*, and vice versa, whenever this construction is plainly required to give effect to the intention of the person using it * * *."

"(a) After a report of a breach or violation has been filed, *or upon its own motion and without any report of a breach or violation having been previously filed*, the Department may issue and cause to be served upon the respondent a formal complaint stating the charges and containing a notice of hearing * * * ." (Italics ours.)

2. Petitioners further contend (Br., pp. 55-56) that to read Section 5 as applicable to wage determinations would make the third sentence in Section 4 mere surplusage, since Sections 4 and 5 each grant power to make findings,—the first, with respect to wage determinations, the second, with respect to violations of contract stipulations. This argument has already been disposed of above.

3. It is further argued (Br., p. 60) that, since Section 5 provides that findings are not binding on the courts unless supported by "the preponderance" of the evidence, a holding that such section is applicable to wage determinations would run counter to the alleged Congressional trend with respect to the weight to be given "quasi-legislative" findings. It is said that no such inconsistency with the trend is involved in requiring such preponderance for "quasi-judicial" findings with respect to violations of contract stipulations; and presumably the same position would be taken in regard to all other findings covered by Section 5, such as findings in respect of a ruling by a contracting officer that a particular bidder's proposal could not be considered because he was not a "manufacturer or regular dealer" (§ 1 (a)).

But the trend of modern statutes has been to

make conclusive *all* administrative findings of fact, whether quasi-legislative or judicial, if supported by substantial evidence. This statute is an exception. And the immediate problem is one of giving effect to its provisions as written; not of criticizing the theory underlying such provisions.

4. Petitioners also urge that there is nothing in the legislative history of Section 5 to indicate that it was intended to apply to wage determinations (Br., p. 60). With that unsupported statement we take sharp issue.

B. The legislative history of the Act clearly shows that it was the intention of the Congress that a hearing should be held by the Secretary prior to a determination of prevailing minimum wages.

1. The Walsh bill.

The Walsh bill, as originally introduced (S. 3055, 74th Cong., 1st Sess.; see p. 73, *supra*), did not contain any provision with regard to hearings.

At the Senate Committee hearings on the Walsh bill, however, it was urged by John C. Gall, Associate Counsel of the National Association of Manufacturers, that such bill be amended so as to make provision for a procedure which would give affected industries the opportunity for a hearing before a determination of minimum wages and maximum hours, such hearing to be followed by findings conforming to a statutory standard.[5]

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[5] Hearings before the Committee on Education and Labor, U. S. Senate, 74th Cong., 1st Sess., on S. 3055, June 17, 1935, pp. 32-33.

Thereafter, the bill was completely rewritten by the Senate Committee, and as so rewritten, passed the Senate, without any change here material, on August 12, 1935. A copy of the bill, as thus passed, is set forth in Appendix IV.

As hereinbefore noted (p. 74, *supra*) such bill authorized the President, who was in turn authorized to delegate his authority to an agency (§ 10), to determine minimum wages and maximum hours which should be fair and reasonable, taking into account certain standards (§ 8). Section 5 of such bill, insofar as here material, provided as follows:

> "Sec. 5. Upon his own motion, or on complaint of a breach or violation of a representation, agreement, or covenant made as herein provided, the President shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence. * * * and the President *shall have the power* to make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the evidence, shall be conclusive upon review by the courts, and the President shall have the power, and is hereby authorized, to make such decisions based upon findings of fact as are deemed to be necessary to enforce the provisions of this Act." [Italics ours.]

Whether or not the bill, as so passed, required a hearing prior to a wage determination cannot be stated with definiteness. It would seem, however, that the provisions of Section 5 clothing the President (or the agency to which he might delegate re-

sponsibility) with power to make findings of fact after notice and hearing were intended to be mandatory, since Section 8 authorized him to determine only "fair and reasonable" wages in the light of specified standards.

2. The Healey bill.

As previously noted, the Walsh bill was not reported out of the House Judiciary Committee, to which it was referred, during the First Session of the 74th Congress (see p. 75, *supra*). As also noted, at the Second Session of the 74th Congress, the Healey bill (H. R. 11554-74th Cong., 2nd Sess.), a copy of which is set forth in Appendix V, was introduced.

The substantive provisions of the Healey bill have been summarized at an earlier point (*supra*, pp. 75-77). As there stated in greater detail the Secretary of Labor was authorized by Section 9 to determine minimum wages and maximum hours, the minimum wages so fixed to be fairly and reasonably commensurate with the value of the service or class of service rendered and to be established by the Secretary, who was not to be "bound by any technical rules of *evidence* or procedure", in the light of certain permissive standards. Section 7 of the Healey bill, insofar as here material, provided as follows:

> "Sec. 7. Upon his own motion, or on complaint of a breach or violation of a representation, agreement, or covenant made as herein provided, the Secretary of Labor or representative designated by him shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses

> and the production of evidence under oath. * * * and the Secretary *shall* make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the evidence, shall be conclusive upon review by the courts; and the Secretary shall have the power, and is hereby authorized, to make such decisions based upon findings of fact as are deemed to be necessary to enforce the provisions of this Act." [Italics ours.]

The Healey bill thus removed any ambiguity which may have existed in the Walsh bill with respect to the matter now under consideration. It deliberately changed the corresponding provisions in the Walsh bill so as to require that the findings, which would be necessary for wage determinations, should be made after notice and hearing.

3. The hearings on the Healey bill.

At the hearings held on the Healey bill by the sub-committee of the House Committee on Judiciary (see p. 77, *supra*), Gerard D. Reilly, Acting Solicitor of the Department of Labor, presented a letter from Secretary Perkins in which she stated, *inter alia* (Hearings, p. 125):

> "There are one or two changes * * * which I should like to propose to you * * *. The first is with reference to the provisions of the bill common to sections 6, 7, 8 and 9 which place sole responsibility for making findings of fact under the Act upon the Secretary of Labor. In view of the fact that questions of fixing minimum wages and maximum hours * * * are of a highly controversial nature, it

seems to me unwise to place the responsibility for deciding such questions upon a Cabinet officer whose *administrative* duties under the organic act creating the Department of Labor make it important that the incumbent of the office maintain friendly relations with both industry and labor * * *. I * * * feel strongly that the administrative and *quasi-judicial* functions incident to your bill should be separated.

My suggestion is that the bill contain provisions authorizing the creation of a wage and hour board in the Department of Labor.

* * *

* * * the board would have sole responsibility for all *quasi-judicial* functions vested in the Secretary by the Bill.

* * * * * *

In accordance with these suggestions I am enclosing for your consideration a copy of the bill containing draft amendments to sections 6, 7, 8 and 9. As you will observe, the amendments to section 6 provide *merely for the mechanics of setting up the board.* The amendments to sections 7 and 9 chiefly consist of inserting the word "Board" in lieu of "Secretary of Labor." The amendments to section 8 are of the same character * * *." [Italics ours.]

The amendment to Section 6 of the Healey bill which the Secretary submitted (Hearings, p. 126), was, insofar here material, as follows:

"SEC. 6. (a) The Secretary of Labor is hereby authorized to administer and enforce the provisions of this act and to create in the Department of Labor a unit for this purpose and a wage-and-hour board composed of three

persons (hereinafter referred to as the Board). The Secretary of Labor is further authorized to appoint * * * the Board members, an administrative officer, and attorneys, and * * * such other employees as he may find necessary to administer this Act. * * *.

"The Board shall have power to make investigations and findings *as hereinafter provided*, and such findings shall not be subject to review by any person or agency in the executive branch of the Government.

"(b) The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. * * *.

"(c) The Secretary of Labor shall have authority from time to time to make * * * such rules and regulations as may be necessary to carry out the provisions of this Act."

The amendments to Sections 7, 8 and 9 conformed to the description in Secretary Perkins' letter (Hearings, pp. 126-127).

Subsequently, Secretary Perkins appeared before the Committee, and testified in support of her amendments, as follows (Hearings p. 224):

"I would like also to ask your consideration of the suggestion I made in my letter with regard to the administration. I think the administration of this bill should be, as you have indicated, in the Department of Labor. But I wish to suggest the great desirability of separating the administration and the quasi-judicial functions involved in this bill. I do not think any one individual, and certainly not a Cabinet officer, who has a great variety of duties under the basic act creating the

executive department, ought to be asked or allowed to take full responsibility for the performance of *so important a quasi-judicial function as the setting of minimum wages* and maximum hours * * *.

"I think such a function should be performed by a group of persons, by not less than three, *and only after they have held a public hearing* at which everybody in interest can at least register his idea of what is proper as to wages, hours, and all that sort of thing." [Italics ours.]

It is apparent from the foregoing that the Secretary thought that the making of a wage determination involved quasi-judicial action; that determinations by the board the establishment of which she recommended would only be made after public hearing; and that such public hearing would be held pursuant to the provisions of Section 7. And this conclusion is supported by the specific wording of the amendment offered by the Secretary to Section 6, which provided: "The Board shall have power to make investigations and findings as hereinafter provided, * * *." The latter three words obviously refer to Sections 7 and 9.

4. The revision of the Healey bill.

Following the hearings the Healey bill was revised by the House Judiciary Committee, and was enacted in substantially the form in which it was thus revised (p. 93, *supra*).

Sections 6 and 7 of the original bill were renumbered Sections 4 and 5, respectively, and many of the changes recommended by the Secretary were adopted. Although the Secretary was not authorized, in terms, to create a board which would be

entirely independent of her, delegation of authority in respect of certain of the matters covered by her amendment was permitted by an amendment of Section 7 (renumbered Section 5), which authorized representatives of the Secretary to make decisions necessary to enforce the provisions of the Act, and by an amendment of Section 6 (renumbered Section 4), which authorized either the "Secretary of Labor or his authorized representatives * * * to make investigations and findings as herein provided * * *".

In the latter connection, it is significant to note that whereas the Secretary's suggested amendment of Section 6 had referred to "findings as *hereinafter* provided", at a time when both the provisions of the bill requiring findings to be made after notice and hearing and the provisions of the bill authorizing wage determinations were contained in sections following Section 6, the Committee revision of Section 6 (renumbered Section 4) changed this language to read "findings as *herein* provided", contemporaneously with the shift of the wage provisions of the bill to Section 1 (b).

In the revision of Section 7 of the Healey bill, renumbered Section 5, the material changes effected were as follows (insertions being indicated by italics and deletions by matter in brackets):

> "Sec. [7.] 5. Upon his own motion [,] or *on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of this Act, and* on complaint of a breach or violation of [a] *any* representation [agreement,] or [covenant made] *stipulation* as herein provided, the

> Secretary of Labor, or *an impartial* representative designated by him, shall have the power to hold hearings * * *; and [the Secretary] shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the *preponderance of the* evidence shall be conclusive [upon review by the courts] *in any court of the United States;* and the Secretary *of Labor or authorized representative* shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act."

The obvious purposes of the revisions so effected were (1) to provide an additional occasion for the holding of hearings, viz., upon application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of the Act; (2) to require that any representative designated by the Secretary to hold hearings should be impartial; (3) to provide that the findings of fact of the Secretary should be conclusive upon judicial review in the courts only if supported by a "preponderance of the evidence" (as distinguished from "the evidence"); and (4) as above stated, to authorize "decisions" by representatives of the Secretary.

5. The statements made by Representative Healey on the floor of the House that hearings must be held prior to wage determinations.

In the course of the debate on the floor of the House prior to passage of the bill, Representative Healey twice stated, in terms, that it required a

hearing by the Secretary prior to a determination of prevailing minimum wages. In outlining briefly the provisions of the bill and in answering questions, he made the following remarks:

> "Section 5 is the procedural section * * *. The Secretary may only make findings after proper notice and hearing. (80 Cong. Rec. 10002)
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> * * * * * *
>
> "* * * As I view it, the prevailing wage is a fact which already exists. The Secretary's duty is simply to inquire and ascertain what that prevailing wage is." (80 Cong. Rec. 10003)
>
> * * * * * *
>
> "The prevailing minimum wage will be determined, presumably, before a contract is entered into. In other words, *the Secretary of Labor will have to conduct an investigation, hold hearings*, and take whatever steps are necessary to determine the prevailing wage, before the wage provisions of this bill become effective under section 11. Until that is determined, no minimum-wage provision will be included in a contract."
>
> * * * * * *
>
> The prevailing wage will be determined for the general locality. It will be, as I have stated, by investigation and *hearing*." (80 Cong. Rec. 10023) [Italics ours.]

The foregoing review of the legislative history of Sections 4 and 5 of the Act confirms beyond dispute, we believe, that the provisions of Section 5 require a hearing [6] by the Secretary prior to a de-

[6] Petitioners concede that it has been the consistent administrative practice to hold hearings prior to making determinations of prevailing minimum wages; and also that

termination of prevailing minimum wages, and that such section expressly contemplates judicial review by the courts of such a determination.

It is equally clear that upon such review all questions of law, such as "the construction to be placed upon the language of Section 1(b) of the Public Contracts Act", are to be determined by the court, and that the Secretary's rulings with respect thereto are not to be conclusive or to be given any effect unless correct. Section 5 provides that only the Secretary's findings of fact shall be conclusive in the courts, and then only "if supported by the preponderance of the evidence."

C. Even if Section 5 of the Act does not apply to determinations of prevailing minimum wages, the court below had jurisdiction, since the Act does not contain a specific provision to the contrary, to consider and decide respondents' claims that the action of petitioners complained of herein was beyond their statutory jurisdiction and authority.

Since the Public Contracts Act does not expressly provide to the contrary, the question whether the acts of petitioners complained of herein were beyond their jurisdiction and authority was properly considered by the court below.

Even in fields in which the subject matter of an administrative determination is within the cate-

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such hearings are "perhaps indispensable to a wise administration of the Act." (Br., pp. 140-141.)

It is well established that the consistent practice of holding hearings, prior to administrative action, affords support to the contention that the applicable statute, if ambiguous, requires hearings (*Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329, 336-337).

gory of matters which Congress can constitutionally commit to the exclusive jurisdiction of the executive branch of the Government, it is well established that the courts have power to entertain a bill in equity brought for the purpose of restraining or undoing unauthorized or arbitrary and capricious acts of administrative officers which invade or threaten to invade the rights of private parties.

In such a case the function of the court is not, it seems, that of "review", in the sense in which that term is most often used, but, rather, one of control. That is, in such a case, the court, in the exercise of its ordinary equity jurisdiction, is simply called upon to determine whether the act of the administrative official which invades or threatens to invade a private right is an act within the statutory authority of such official which, of course, never includes a grant of power to act arbitrarily and capriciously. The function of the court is well illustrated in the instant case where petitioners claim that their admitted interference with respondents' business relations is justified by the fact that they are acting in discharge of their official duties as Government officers. The power of the court in determining the issue so presented does not depend on any express statutory grant of the power to review the acts of such Government officers. In the exercise of its ordinary equity jurisdiction the court is empowered to inquire into the legality of their acts, unless it has been deprived of such power by a specific statutory prohibition.

The applicable rule in such cases was stated as follows by Mr. Justice Brandeis in the dissenting opinion in *Crowell* v. *Benson*, 285 U. S. 22, 89-91:

"With respect to them [administrators of matters which Congress may commit to conclusive executive determination] the function of the courts is not one of review but essentially of control—the function of keeping them within their statutory authority. No method of judicial review of the administrative action had been provided by Congress in any of the cases cited; * * *. In each case, the Court held that, if the administrative officer had acted outside his authority, the unwritten law supplied a remedy, and that relief could be had, according to the nature of the case, on bill in equity or habeas corpus. The question decided in each case was that *Congress should not be taken, in the absence of specific provision, to have intended to subject the individual to the uncontrolled action of a public administrative officer.* See American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 110, 23 S. Ct. 33, 47 L. Ed. 90." [Italics ours.]

In *Waite* v. *Macy*, 246 U. S. 606, the court enjoined the Tea Board from attempting to enforce a regulation of the Secretary of the Treasury prohibiting the importation of tea containing any coloring matter. The statute under which the Secretary purported to act prohibited the importation of tea which was "inferior in purity, quality and fitness for consumption" to certain specified standards which contemplated that the tea should be tested "according to the usages and customs of the tea trade," and empowered the Secretary of the Treasury to enforce the statute by regulations. This Court held that the regulation in question was beyond the Secretary's power

under the statute and granted the injunction, saying, in part (246 U. S. at pp. 608-609):

> "* * * The Government says that the bill is an attempt to control a board in the performance of its statutory duty and to substitute the judgment of a court for that of the board.
>
> "No doubt it is true that this Court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that *the board cannot enlarge the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality or fitness for consumption.* * * *" [Italics ours.]

and (at p. 610):

> "The Secretary and the board must keep within the statute, *Merritt* v. *Welsh*, 104 U. S. 694, which goes to their jurisdiction, see *Interstate Commerce Commission* v. *Northern Pacific Ry. Co.*, 216 U. S. 538, 544, and we see no reason why the restriction should not be enforced by injunction, as it was, for instance, in *Bacon* v. *Rutland R. R. Co.*, 232 U. S. 134. *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 620. *Santa Fe Pacific R. R. Co.* v. *Lane*, 244 U. S. 492. *We are satisfied that no other remedy, if there is any other, will secure the plaintiff's rights.*" [Italics ours.]

In *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, the plaintiff was granted an injunction enjoining a local postmaster from giving effect to an order of the Postmaster General whereby such postmaster was directed to mark letters addressed to the plaintiff "fraudulent", to return such letters to the senders and to refuse to honor money orders drawn in the plaintiff's favor. The statute authorized such action

"upon evidence satisfactory" to the Postmaster General that any person was engaged in conducting a scheme for obtaining money through the mails by means of fraudulent pretenses. The defendant demurred to the complaint and the demurrer was overruled and the decision of the District Court was affirmed by this Court.

The Court held that, on the facts stated in the complaint and admitted by the demurrer, the Postmaster General had acted under a mistake of law and, his order not being within the statutory authority, its enforcement would be enjoined.

The Court said (187 U. S. at p. 107):

> "Conceding, for the purpose of this case, that Congress has full and absolute jurisdiction over the mails, and that it may provide who may and who may not use them, * * * the question still remains as to the power of the court to grant relief where the Postmaster General has assumed and exercised jurisdiction in a case not covered by the statutes, and where he has ordered the detention of mail matter, when the statutes have not granted him power so to order. * * *"

and (at p. 108):

> "That the conduct of the Post Office is a part of the administrative department of the government is entirely true, but that does not necessarily and always oust the courts of jurisdiction to grant relief to a party aggrieved by any action by the head or one of the subordinate officials of that department which is unauthorized by the statute under which he assumes to act. *The acts of all its officers must be justified by some law, and in case an official violates the law to the injury*

of an individual the courts generally have jurisdiction to grant relief." [Italics ours.]

and (at pp. 109-112):

"Here it is contended that the Postmaster General has, in a case not covered by the acts of Congress, excluded from the mails letters addressed to the complainants. His right to exclude letters, or to refuse to permit their delivery to persons addressed, must depend upon some law of Congress, and if no such law exists, then he cannot exclude or refuse to deliver them. * * * *If the evidence before the Postmaster General, in any view of the facts, failed to show a violation of any Federal law, the determination of that official that such violation existed would not be the determination of a question of fact, but a pure mistake of law on his part,* because the facts being conceded, whether they amounted to a violation of the statutes, would be a legal question and not a question of fact. Being a question of law simply, and the case stated in the bill being outside of the statutes, the result is that the Postmaster General has ordered the retention of letters directed to complainants in a case not authorized by those statutes. * * *

"The facts, which are here admitted of record, show that the case is not one which by any construction of those facts is covered or provided for by the statutes under which the Postmaster General has assumed to act, and *his determination that those admitted facts do authorize his action is a clear mistake of law as applied to the admitted facts, and the courts, therefore, must have power in a proper proceeding to grant relief. Otherwise, the individual is left to the absolutely uncon-*

*trolled and arbitrary action of a public and administrative officer, whose action is unauthorized by any law and is in violation of the rights of the individual. * * *"*

"The Postmaster General's order, being the result of a mistaken view of the law, could not operate as a defense to this action on the part of the defendant, * * *. Although the Postmaster General had jurisdiction over the subject-matter (assuming the validity of the acts), and therefore it was his duty, upon complaint being made, to decide the question of law whether the case stated was within the statute, yet *such decision, being a legal error, does not bind the courts.*" [Italics ours.]

In *Gegiow* v. *Uhl*, 239 U. S. 3, petitioners sought a writ of *habeas corpus* for the release of immigrants held under a deportation order issued by the Acting Commissioner of Immigration. The Commissioner had purported to issue the order under a statute providing for the exclusion of a person "likely to become a public charge". The conclusion that the petitioners were likely to become public charges was based upon a finding that they were bound for Portland, Oregon, where bad industrial conditions had been reported.

This Court granted *habeas corpus* on the ground that the reasons assigned for the issuance of the deportation order were insufficient and showed that it was issued under a clear mistake of law and in excess of the power conferred by the statute. The Court said, in part (239 U. S. at p. 9):

"The courts are not forbidden by the statute to consider whether the reasons, when they are given, agree with the requirements of the act. *The statute by enumerating the*

conditions upon which the allowance to land may be denied, prohibits the denial in other cases. And when the record shows that a commissioner of immigration is exceeding his power, the alien may demand his release upon habeas corpus. The conclusiveness of the decisions of immigration officers under § 25 is conclusiveness upon matters of fact. This was implied in *Nishimura Ekiu* v. *United States*, 142 U. S. 651, relied on by the Government. As was said in *Gonzales* v. *Williams*, 192 U. S. 1, 15, 'as Gonzales did not come within the act of 1891, the Commissioner had no jurisdiction to detain and deport her by deciding the mere question of law to the contrary.' Such a case stands no better than a decision without a fair hearing which has been held to be bad. * * *" [Italics ours.]

In *Work* v. *Louisiana*, 269 U. S. 250 (discussed at pp. 243-245, *infra*), the State of Louisiana sought by a bill in equity to restrain the Secretary of the Interior from illegally requiring it, as a condition precedent to consideration of its claim to certain swamp lands under various acts of Congress, to show that the lands were non-mineral in character. This Court granted that relief, and in the course of its opinion stated (269 U. S. at pp. 254, 260):

"In short, it is merely a suit to restrain the Secretary from rejecting its claim, independently of the merits otherwise, upon an unauthorized ruling of law illegally requiring it, as a condition precedent, to show that the lands are not mineral in character.

"It is clear that if this order exceeds the authority conferred upon the Secretary by law and is an illegal act done under color of his office, he may be enjoined from carrying it into effect.

* * * * * *

> "We conclude that the Swamp Land Acts granted to the States the swamp and overoverflowed lands, rendered unfit for cultivation, without reference to their mineral character; and that in requiring the State to establish the non-mineral character of the lands in question the Secretary exceeded the authority conferred upon him by the acts and attached this condition to the prosecution of the claim of the State without warrant of law." [7]

Petitioners contend that it will be "inappropriate" in this case to "read into the Public Contracts Act judicial reviewability of wage determinations", because, they say, this case "concerns the strictly nonregulatory functions of the Government" (Br., pp. 60-61). The question, however, is not whether the Court should read into the Act "judicial reviewability" of the Determination but whether it should read into the Act "judicial *non*-reviewability" of the action of petitioners beyond their authority in attempting to enforce the Determination against respondents. The two cases

[7] For other authorities to the effect that the courts will disregard action by an administrative body or officer not authorized by statute, or which is based on an error of law, see *Philadelphia Company* v. *Stimson*, 223 U. S. 605; *Kessler* v. *Strecker*, 307 U. S. 22; *Ann Arbor R. Co.* v. *United States*, 281 U. S. 658; *United States* v. *State of Idaho*, 298 U. S. 105; *Merritt* v. *Welsh*, 104 U. S. 694; *Iselin* v. *United States*, 270 U. S. 245; *Chic., M. & S. P. Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97, 99; *Brooklyn Daily Eagle* v. *Voorhies*, 181 Fed. 579 (U. S. D. C., E. D. N. Y.); *Wisconsin Cent. R. R.* v. *Forsythe*, 159 U. S. 46; *Daniels* v. *Wagner*, 237 U. S. 547; *Ickes* v. *Virginia-Colorado Development Corporation*, 295 U. S. 639; *Santa Fe Pac. R. R.* v. *Lane*, 244 U. S. 492; *Morrill* v. *Jones*, 106 U. S. 466; *United States* v. *George*, 228 U. S. 14, 21; *Haskin Bros. & Co.* v. *Morgenthau*, 85 F. (2d) 677, 684 (Ct. App. D. C.); and *Degge* v. *Hitchcock*, 229 U. S. 162, 171.

cited by petitioners certainly do not support their position that such a prohibition should be read into the Act,[8] and the cases which we have just discussed are direct authorities against that position.

Petitioners urge that Congress intended that determinations of prevailing minimum wages, even though made in excess of the jurisdiction of the Secretary of Labor under the Act, should be absolutely final and binding. We doubt that an unexpressed intent of Congress may *ever* be shown clearly enough to outweigh the weighty reasons that have led the courts to require that there be a "specific provision" depriving the courts of jurisdiction before it will be held that Congress intended "to subject the individual to the uncontrolled action of a public administrative officer."[9]

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[8] *Work* v. *Rives*, 267 U. S. 175, held that mandamus would not lie to reverse a decision by the Secretary of the Interior disallowing a claim made against the United States under a statute which authorized the rejection of claims unless the Secretary "was satisfied that they were just and equitable", made his decisions "conclusive and final" and expressly forbade resort to the courts to review his decision (see 267 U. S. at 182). *Butte, Anaconda & Pac. Ry. Co.* v. *United States*, 290 U. S. 127, was a similar case, and held, in substance, that Congress by creating a special tribunal to hear and determine claims against the United States necessarily intended that tribunal finally to determine the questions of law and fact that arose in the course of passing on a claim. *Cf. Dismuke* v. *United States*, 297 U. S. 167. Such cases, where the contention of the plaintiffs was, in substance, that Congress had intended to create a right against the United States which could be enforced in court, are not relevant here where the issue is whether Congress intended that the courts should entertain suits to keep petitioners from injuring respondents' rights by action outside of the jurisdiction and authority of petitioners.

[9] *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; Mr. Justice Brandeis, dissenting in *Crowell* v. *Benson*, 285 U. S. 22, 91.

Utah Fuel Co. v. *Coal Commission*, 306 U. S. 56, certainly justifies that doubt. In that case, it was admitted that Congress could have authorized the Bituminous Coal Commission to make public the details of certain cost reports which had been filed by the complainant with the Commission. The Commission, believing that Congress had (as the Court held it had) so authorized it, directed its employees to make such returns public on a certain date. The Bituminous Coal Act provided a method for judicial review of certain orders of the Commission, but the order directing the publication of such returns was not covered by those provisions of the Act. The complainant brought a bill in equity to enjoin the threatened disclosure. The Commission contended, and the Court of Appeals of the District of Columbia agreed, that, since the Act provided a method of review of the Commission's acts in certain cases it impliedly excluded review in all others and, therefore, the suit could not be maintained.

This Court, however, while affirming on the merits the decree of the District Court dismissing the bill, expressly held (306 U. S. at 60) that "Considering the circumstances here alleged, the great and obvious damage which might be suffered, the importance of the rights asserted, and the lack of any other remedy, we think complainants could properly ask relief in equity."

Judicial reviewability in the present case must follow *a fortiori*, since the petitioners' claim of an implied statutory prohibition of review in the circumstances here presented does not even have the support of a statutory procedure for review under other circumstances.

Petitioners, moreover, have not sustained their claim of an implied statutory prohibition against the maintenance of this action. They have not shown in any way that Congress in passing the Public Contracts Act intended that determinations of prevailing minimum wages made by the Secretary of Labor in excess of her statutory authority and jurisdiction should not be open to question in the courts at the suit of one whose rights were invaded thereby.

Petitioners' contention that Congress did have such an extraordinary intent is premised on their statement that the Secretary's determination of a prevailing rate of wages under the original Bacon-Davis Act[10] could be challenged only for fraud, dishonesty or bad faith. Petitioners proceed from that assumption to state that there is nothing in the legislative history of the 1935 amendment to the Bacon-Davis Act (which amendment, it will be recalled, provided for the pre-determination of wage rates prior to the issuing of invitations to bid) to indicate "that the Congress intended to lessen in any way the binding character of the Secretary's decisions" under the original Act (Br., p. 58). Petitioners then argue that since the Public Contracts Act was considered by Congress to be an extension of the amended Bacon-Davis Act into new fields, "it is proper to assume that Congress carried over into the new statute its desire that a determination of prevailing wages be entirely free from review" (*ibid.*).

The principal authority which petitioners cite to support their assumption that the Secretary's determinations under the original Bacon-Davis

[10] Act of March 3, 1931, c. 411, § 1, 46 Stat. 1494.

Act were not open to question in the absence of fraud, dishonesty or bad faith is *Gillioz* v. *Webb*, 99 Fed. (2d) 585 (C. C. A., 5th).

That case was an action by an employee against his employer, a contractor under a construction contract let pursuant to the original Bacon-Davis Act, to recover the difference between the compensation paid him for his services and compensation at the rate determined by the Secretary of Labor to be the prevailing wage for work of a similar nature in the locality.

It was held that the inclusion in the *contract* of the provision of the Act that in case of a dispute as to prevailing wages the Secretary's decision thereon should be conclusive on the parties to the contract rendered the Secretary's decision final in the absence of bad faith or dishonesty, since the parties had themselves provided that she was to be the arbitrator.[11]

It was *not* held that if the Secretary of Labor had acted beyond his statutory authority his act would be final. And in *United States* v. *W. S. Barstow & Co.* 79 Fed. (2d) 496 (C. C. A. 4th), it *was* held that such an act must be disregarded as ineffective.

In that case an action was brought by laborers against a contractor to recover, in respect of the period prior to April 1, 1932, the difference between the wages actually received by them and wages calculated at the higher prevailing rate of

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[11] In *United States for the use of Boucher* v. *Murphy*, 11 F. Supp. 572, the second Bacon-Davis Act case cited by petitioners (Br., p. 57), it was held that employees could not sue for an alleged under-payment of wages, since they had not referred their claim to the Secretary of Labor.

wages that had been determined by the Secretary of Labor pursuant to the provisions of the original Bacon-Davis Act. The decision of the Secretary had been announced on March 3, 1932, but the Secretary subsequently ruled that it was to become effective on March 30. The Circuit Court of Appeals held that the Secretary was not authorized, when he had once found that the rates prevailing at a particular time differed from the rates then being paid by a contractor, to postpone or defer the time when his finding should become effective. Therefore, his ruling "must be disregarded as ineffectual" (79 Fed. (2d) at 498).

We do not believe that the 1935 amendment to the Bacon-Davis Act had the effect of providing that determinations of prevailing wages by the Secretary of Labor thereunder, even though made in excess of her authority, should not be subject to judicial review. On the contrary, it seems obvious that, if the Secretary of Labor, purporting to act under that amendment, should attempt to determine the wages for mechanics and laborers employed in the construction of a public building in Philadelphia upon the basis of the wages that she found to be prevailing elsewhere in the United States, her determination would be a nullity and would be subject to review.

Regardless, however, of what may have been the Congressional intent under the Bacon- Davis Act, the legislative history of the Public Contracts Act (see pp 65-112, *supra*), which shows clearly that Congress did not intend to grant to the Secretary of Labor any broad discretionary powers, but on the contrary, intended to confine her activities within narrow bounds, certainly negatives any

idea that Congress intended to deprive the courts of their ordinary equitable jurisdiction to grant relief against activities outside those statutory bounds.

We have shown, thus far under this Point IX, (a) that the Public Contracts Act expressly contemplates that determinations of prevailing minimum wages by the Secretary of Labor shall be subject to judicial review in a proper case; and (b) that, even if that were not the case, the Act does not forbid such review under the circumstances presented here, for the reason that, even if a presumed intent of Congress could supply the need for a "specific provision" prohibiting review, no such intent has been shown.

We come now to the question of the scope of the judicial review available in this action.

D. Whether the Determination be reviewable under Section 5 of the Act or on general equitable principles, the Court may determine (a) whether petitioners are exceeding their statutory authority in attempting to enforce the Determination against respondents and (b) whether the Determination is arbitrary and capricious.

The minimum scope of the judicial review appropriate in this case is clear, whether considered on general equitable principles or under Section 5 of the Act.

1. The jurisdiction of the Secretary of Labor under the Public Contracts Act is limited by the term "locality" as it is employed in Section 1(b) thereof.

The authority conferred by the Act upon the Secretary of Labor is the authority to determine prevailing minimum wages in the several "localities" in which particular Government supplies are to be produced pursuant to contract. The Secretary has no authority to determine minimum wages prevailing on the continent of North America, or in the United States, or in "regions" or "sections" or "broad geographical areas" of the United States. She must determine such wages *only* in "localities."

The proper construction of the term "locality" as used in Section 1(b) of the Act is a question for this Court. As appears on the face of the Determination (R. 239), the principal question which petitioner McLaughlin purported to decide therein, and that which underlay all other questions which he purported to decide (other than the definition of the Iron and Steel Industry), was "the construction to be placed upon the language of Section 1(b) of the Public Contracts Act," and, particularly, the proper construction of the word "locality."

The legal premise, therefore, upon which the entire Determination was based, and in reliance on which the Acting Secretary selected the six large regions as "localities", was unsound, if the Acting Secretary proceeded upon an "interpretation" of the term "locality" which is untenable and erroneous as a matter of law.

Petitioners have sought to obscure the true issues in this case by implying, in substance, that the only question presented is whether the Acting Secretary abused his discretion. But it is manifest that, before one may properly discuss any question of the exercise or abuse of discretion, one must

determine the field within which, under the particular statute in question, the discretion is to be exercised. That is a pure question of law.

Under Section 1(b) of the Act, it is only within "localities" that prevailing minimum wages may be determined. The content of the word "locality", therefore, delimits the field within which the Secretary of Labor is to exercise such discretion as the Act vests in her. If she attempts to determine wages in other than "localities", she is not exercising her discretion—she is exceeding her statutory authority and jurisdiction. The Act certainly does not confer upon the Secretary of Labor any discretion to determine the extent of the power which Congress thereby intended to give her.

2. It is for the Court to determine the scope of the jurisdiction which the Act gives to petitioners, and the question whether they were or were not "unreasonable" or "arbitrary and capricious" in believing that they had the jurisdiction which they purported to exercise is not relevant on that issue.

It is established beyond question, by the cases which we have cited and discussed at pp. 211-218, *supra*, as well as others,[12] that the question of the scope of the jurisdiction conferred by statute upon an administrative officer is a question of law for the courts.

Petitioners, however, contend, in substance, that the Secretary of Labor may *determine her own*

[12] Including *Perkins* v. *Elg*, 307 U. S. 325 (see pp. 258-260, *infra*,) and *Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329 (see p. 232, *infra*).

jurisdiction. Noting the obvious fact that the term "locality" is not a mathematically precise word like "acre" or "square mile", petitioners argue that the Secretary must of necessity, therefore, have discretion to determine the proper construction of "locality", discretion, i. e., to determine what her jurisdiction is. They argue that "even if this Court should disagree with the construction" which petitioners urge, "and might come to a different conclusion if the question were presented as an original proposition", nevertheless, if "the construction has been shown to be tenable and reasonable, and in no way arbitrary or clearly erroneous", that construction is binding on this Court.[13] (Br., p. 135). This unusual suggestion is altogether untenable.

There are, of course, many instances in which an executive or administrative officer may employ a sound discretion in *exercising the jurisdiction* conferred upon him by law. But it has never been held or suggested that an executive or administrative officer has the power or discretion finally and conclusively to determine *what his jurisdiction is* by construction of the statute delimiting the scope of his authority or otherwise.[14]

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[13] Petitioners also put their argument thus (Br., p. 137): "In the absence of a statutory method of review, the courts have sought only to keep the actions of the administrative official within the bounds both of reason and of his jurisdiction." If by that somewhat ambiguous statement petitioners mean that a court will not enjoin action by an administrative official, beyond his jurisdiction and to the injury of a complainant, unless the court feels that the official was unreasonable in exceeding his jurisdiction, the statement is absolutely without authority or reason to support it.

[14] Certainly, none of the cases cited by petitioners (Br., pp. 134-139) so holds.

Stated differently, it is perfectly plain that the Secretary may not, in the exercise of discretion or otherwise, determine the meaning of the term "locality", as employed in the statute, and thereby bind the courts or any one else to *her* conception of what her jurisdiction is under the statute. However, *within the limits of her jurisdiction*, as determined by the proper judicial definition of the term "locality", she may, in her sound discretion, ascertain prevailing minimum wages in such units of territory as are comprehended by such definition of the term "locality".

In none of the leading cases relied on by respondents was the inquiry into the extent of the statutory authority and jurisdiction of the defendant framed along lines of whether the construction of the statute by the defendant was a reasonable one, nor did the court inquire either whether the action complained of was *only a little* beyond the authority conferred or whether it was arbitrarily and capriciously so.

The exceptional principle [15] which petitioners seek to invoke in this case (namely, that the interpretation of a statute by an executive officer will be accepted by the courts if not unreasonable or arbitrary or capricious) has been applied almost exclusively in cases involving mandamus or mandatory injunction similar in effect.[16]

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[15] The general rule is stated in *Chi., M. & St. P. Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97, 99, as follows: "But the question is of the meaning of a statute and upon that, of course, the courts must decide for themselves." In *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 134, n. 11, this Court stated: "To be sure, statutory construction is a judicial function."

[16] The issuance of a mandatory injunction is "governed by like considerations" as the issuance of a mandamus

If, in the performance of his function of carrying out the laws, an executive officer reasonably believes that he would, by taking particular action, violate a statute which he is sworn to carry out, a wholesome respect for a coordinate branch of the Government impels the courts not to force him to take such action.

Such considerations have no application, however, in a case, such as this, where the grievance is that an executive officer, by misconstruing a statute defining the scope of his jurisdiction, *has acted*, or is threatening to act, in excess of that jurisdiction, to the injury of the rights of the plaintiff. In such a case, the executive officer is sued primarily in his individual capacity and, as a defendant accused of a wrong to private rights, can justify himself only by showing that his action or threatened action is authorized by law.[17]

On the few occasions when the exceptional principle to which we have referred has been applied in other than mandamus cases, the statute involved has been construed to vest in the administrative officer in question the jurisdiction to determine, within prescribed limits, questions of law.[18]

It is clear that the Public Contracts Act does not grant to the Secretary of Labor any such broad power. On the contrary, the only authority vested in her is that of *ascertaining an existing fact*, viz.,

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when it is used for the same purpose, viz., to compel, directly or indirectly, the performance by an executive officer of an official duty. *Miguel* v. *McCarl*, 291 U. S. 442, 452.

[17] See cases cited under Point X, *infra*.

[18] *United States ex rel. Ness* v. *Fisher*, 223 U. S. 683; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324; *Work* v. *Rives*, 267 U. S. 175, 183 (Land Department); *cf. Work* v. *Louisiana*, 269 U. S. 250 (see pp. 243-245, *supra*); *Santa*

the prevailing minimum wage paid in a particular industry, etc., in particular localities.

Petitioners' misconception of the proper application of the principle on which they rely is nowhere more apparent than in the intimation (Br., p. 137) that that principle applies with regard to "ordinary injunctions to restrain an officer from taking action said to be contrary to law".[19] The decisions on which we rely (including *Waite* v. *Macy*, *American School of Magnetic Healing* v. *McAnnulty*, *Gegiow* v. *Uhl*, *Work* v. *Louisiana* and *Perkins* v. *Elg*) show conclusively that such is not the case. Petitioners' attempts to dismiss those cases by begging the question,[20] or by suggesting that those cases are unusual and held only that "the error of law" was "so plain as to be beyond the protection of this facet of the rule of ad-

Fe Pac. R. R. Co. v. *Payne*, 259 U. S. 197; *Noble* v. *Union River Logging R. Co.*, 147 U. S. 165. *Adams* v. *Nagle*, 303 U. S. 532; (Comptroller of the Currency). The Comptroller must, however, "move within the orbit of the National Banking Act." *Inland Waterways Corporation* v. *Young*, No. 6, this Term. The Postoffice Department cases cited by petitioners (*Public Clearing House* v. *Coyne*, 194 U. S. 497; *Bates & Guild Co.* v. *Payne*, 194 U. S. 106) held only that action of the Department involving questions of law is presumed to be correct, and the latter case specifically excepted action in excess of jurisdiction (194 U. S. at 109). *Houston* v. *St. Louis Ind. Packing Co.*, 249 U. S. 479, held only that the statute there concerned made the officer's decision conclusive on questions of fact.

[19] *Gaines* v. *Thompson*, 7 Wall. 347, relied on by petitioners to support this statement, clearly rested upon the entirely different principle that the courts will not generally intervene in any matter while it is still before an executive officer awaiting the exercise of his official discretion.

[20] As by saying (Br., p. 138) that "if the administrative agency has no jurisdiction to act under the circumstances, the court will not, of course, accept its views as binding."

ministrative finality" (Br., pp. 138-139), require no refutation.[21]

3. Even if the Act were construed to authorize the Secretary of Labor in a proper case to determine a prevailing minimum wage for an area as large as the Thirteen State Area, if in the light of relevant economic facts such a determination should be necessary or appropriate to carry out the purposes of the Act, respondents are entitled to a judicial determination of their claim that the action of the Secretary in this case is beyond her statutory authority because it is arbitrary and in the teeth of the statute.

We have shown elsewhere (see pp. 124-136, *supra*) that, even if the term "locality" as used in Section 1(b) of the Act should be interpreted to confer on the Secretary of Labor the *power* in a proper case to select "localities" as large as those designated in the Determination, the selection as a "locality" of the Thirteen State Area was arbitrary and capricious and therefore, not within such power.

It is well settled that administrative action is unlawful if it is arbitrary and capricious.[22]

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[21] The attempt (Br. p. 138, n. 25) to distinguish cases involving suits against collectors for taxes illegally assessed is unsound. Such suits are, it is true, now held to be statutory in origin, but they were originally non-statutory, and the scope of judicial review is no broader now than it was in early days.

[22] In *Degge* v. *Hitchcock*, 229 U. S. 162, 171, in deciding that certiorari does not lie to review administrative action, the Court said that "had there been an arbitrary exercise of statutory power, or a ruling in excess of the jurisdiction

In *Lloyd Sabaudo Societa Anonima Per Azioni* v. *Elting*, 287 U. S. 329, plaintiff brought suit to recover from the Collector of Customs certain fines alleged to have been illegally exacted by the Secretary of Labor. Section 9 of the Immigration Act of 1917 provided for the imposition of fines upon any person "If it shall appear to the satisfaction of the Secretary of Labor" that such person had brought certain diseased aliens into the United States and that the existence of such affliction might have been detected by means of a competent medical examination at the time of foreign embarkation. Here the plaintiff had submitted medical certificates executed by foreign doctors at the time of embarkation. It did not appear that the Secretary of Labor had made available to the medical examiner of the United States the foreign certificates obtained by the plaintiff. The Court held that the fines must be returned on the ground that the Secretary had acted arbitrarily and unfairly.

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conferred, they [the plaintiffs] had the right to apply for and obtain appropriate relief in a court of equity." In *Santa Fe Pac. R. Co.* v. *Payne*, 259 U. S. 197, 199, the statute involved provided that railroads which should surrender certain land grants should be entitled to select in lieu thereof other public lands "of equal value * * *, as may be agreed upon with the Secretary of the Interior." In holding that the Secretary "went beyond the powers conferred upon him by the statute when he took into account [in determining the value of certain lieu lands selected by the plaintiff] facts not known at the time of the selection," and that the plaintiff was "entitled to bring that question into court", the Court said that "it is true that the Secretary had to be satisfied upon that point [the value of the lieu lands], but his discretion was not arbitrary; it went only to the quality of the lands."

See also *Gegiow* v. *Uhl, supra; Kwock Jan Fat* v. *White*, 253 U. S. 454, 464; *Chin Yow* v. *United States*, 208 U. S. 8; *Interstate Commerce Commission* v. *Louisville & Nashville Railroad Company*, 227 U. S. 88, 91; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94.

Petitioners argue, in substance, that, if the Secretary of Labor was not required to hold a hearing before making the Determination, respondents cannot challenge the sufficiency of the evidence on which she acted and, therefore, cannot attack the Determination as arbitrary and capricious (Br., pp. 139-144).

The argument is based upon a mis-conception of respondents' position. In this branch of the case (i. e., the scope of judicial review whether on general equitable principles or under Section 5 of the Act), respondents are not asserting that the Determination is arbitrary and capricious *merely* because the evidence before the Secretary does not support it. On the contrary, respondents maintain that the Determination on its face is arbitrary and capricious, because the sole reason given therein for selecting the Thirteen State Area as a "locality" is, in the light of the admitted facts, a palpably insufficient justification for such action.

Even where an officer or agency has a discretion so broad as to be uncontrollable by the courts, if the officer or agency, in exercising that discretion, reveals that the particular choice was made because of an error in interpreting the applicable statute, the courts will correct the error, if it be challenged as invading legal rights. As Mr. Justice

Holmes said in the passage from *Gegiow* v. *Uhl*, 239 U. S. 3, 9, which we have quoted before:

> "The courts are not forbidden by the statute to consider whether the reasons, when they are given, agree with the requirements of the Act."

In *Perkins* v. *Elg*, 307 U. S. 325, 350 (discussed at pp. 258-260, *infra*), the Court, in holding that a declaratory judgment should be given against the Secretary of State, said:

> "The decree in that sense would in no way interfere with the exercise of the Secretary's discretion with respect to the issue of a passport but would simply preclude the denial of a passport on the sole ground that Miss Elg had lost her American citizenship."

In *Federal Power Commission* v. *Pacific Power & L. Co.*, 307 U. S. 156, 160, the Court said:

> "The court has power to pass judgment upon challenged principles of law insofar as they are relevant to the disposition made by the Commission."[23]

Petitioners rely largely upon *Adams* v. *Nagle*, 303 U. S. 532. That was a stockholders' class suit to enjoin the enforcement of an assessment ordered by the Comptroller of the Currency of the stockholders of a national bank. The statutes involved,

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[23] See also *Work* v. *Louisiana*, 269 U. S. 250; *Santa Fe Pac. R. Co.* v. *Lane*, 244 U. S. 492.

as construed by the Court, invested the Comptroller with jurisdiction to order an assessment on the shareholders of a national bank "if, upon an investigation, he finds that the assets are insufficient to pay the debts" (303 U. S. at 540). The gravamen of the complaint was that the Comptroller, due to an error of law, had ignored certain assets in finding that the bank's assets were insufficient to pay its debts, and it was, therefore, further contended that he had acted without the scope of his authority and arbitrarily and capriciously in ordering the assessment.

The Court held that the complaint should have been dismissed, ruling that the action of the Comptroller was not arbitrary (at p. 543); and that, at most, he had in a doubtful case "erroneously estimated the value of the bank's assets" (at p. 543) *in exercising the jurisdiction* conferred upon him to find whether or not its assets were sufficient to pay its debts. The Court pointed out that in such a case as that presented, where an administrative officer in enforcing a statute is vested with *a discretion to act* or *not* to act, and is to act "in the light of the facts he ascertains and the *judgment* he forms" (*i.e.*, after his own investigation, but without a hearing), the administrative officer does not exceed his jurisdiction by making a mere "error either of fact or law" in arriving at the very conclusion which he is authorized by law to make (at p. 542). The Court indicated, however, that, even in such a case, if the action of the official was arbitrary in the sense of being in "the teeth of a statute", an injunction would be granted (at p. 543).

The *Yagle* case plainly stands for no such proposition as that for which petitioners cite it.[24]

In fact, that case recognizes that even action taken by a public official such as the Comptroller of the Currency, pursuant to a statute authorizing him to take action after a mere finding (made without hearing) representing, in effect, his judgment, may be enjoined if "arbitrary" in the sense of being in the "teeth of the statute". Consequently, even if the Secretary of Labor, under her construction of the Act, could be said to occupy a position similar to the Comptroller, the complaint herein states a cause of action, since the Determination is "in the teeth" of the Public Contracts Act.

But, under the Public Contracts Act, even as construed by petitioners, the Secretary of Labor does not occupy a position or perform a function similar to that of the Comptroller. She does not make a finding, representing, in substance, her judgment, and on the basis of the judgment thus formed take or refrain from action the propriety or necessity of which depends on such judgment. Her function is to determine prevailing minimum wages in localities, and to enforce her determinations in various ways. As petitioners themselves insist, such determinations are "quasi-legislative determinations" *of ultimate facts*. They constitute steps in a statutory plan to regulate members of a particular class,—viz., government contractors.

Petitioners also rely (Br., pp. 142-143) on *Pa-*

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[24] It may be noted parenthetically that the case affords no support for the contention of petitioners, which we have already discussed (pp. 226-230, *supra*), that the Secretary has a discretion *to determine her jurisdiction* under the Act by construing the term "locality" as employed therein.

cific States Co. v. *White*, 296 U. S. 176, 185. That case merely applied the well-settled rule that facts relied upon to rebut the presumption of constitutionality must be specifically set forth in a complaint attacking the constitutionality, under the due process clause, of an attempted exercise of the police power of a State. If that rule be considered applicable in this case, respondents have certainly complied therewith.

Insofar as we know, it has never been contended before now (and it has certainly not been held by this Court) that any presumption of constitutionality can be based on a "conceived state of facts" when the actual facts presently known are contradictory of any facts that could be "conceived" as supporting the action in question.

The similar authorities cited by petitioners (Br., p. 142) are equally inapplicable in this case.[25]

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[25] *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, held that the Tariff Commission, whose function was to assist and *advise* the President, was not required to hold "judicial" hearings in securing information. Mr. Justice Cardozo, however, carefully distinguished (at p. 318) between a body "with power to ordain" [such as the Secretary of Labor in this case] and one "which merely investigates and advises". *Buttfield* v. *Stranahan*, 192 U. S. 470, upheld the constitutionality of the statute setting up the "tea board" which was involved in *Waite* v. *Macy*, 246 U. S. 606. Insofar as the *dicta* at p. 497 of 192 U. S. might indicate that the exercise of the statutory authority to establish standards was not subject to judicial control in the absence of bad faith or malice, *Waite* v. *Macy* held to the contrary. *United States* v. *Chemical Foundation*, 272 U. S. 1, 14-15; *Monongahela Bridge* v. *United States*, 216 U. S. 177, 195; and *The Philadelphia & Trenton R. R. Co.* v. *Stimpson*, 14 Pet. 448, 458, aid petitioners only to the extent of stating that an officer is presumed properly to perform his duties until the contrary is shown. *Martin* v. *Mott*, 12 Wheat. 19, 30, held that the obvious intent of

As previously mentioned, our discussion thus far under this Point IX has been directed to the scope of the judicial review available in this case, whether such review be considered as that contemplated by Section 5 of the Act or as that available on general principles in the absence of a specific provision in the Act prohibiting such review. In that discussion we have made it clear that respondents are entitled to have the Court determine whether petitioners have acted within their statutory jurisdiction and authority and whether, even if they have kept within the strict limits of the power conferred by the Act, they have nevertheless exercised that power in an arbitrary and capricious manner.

If the Determination was required by Section 5 of the Act to be made after a hearing (as respondents have previously shown), the nature of the review available in this action is that outlined by this Court in *Shields* v. *Utah Idaho R. R. Co.*, 305 U. S. 177. In that case, it was pointed out that the scope of judicial review involves the determination of the question whether the administrative body or officer has acted within its authority. This involves, among other things, consideration of whether (1) the hearing required by law was accorded, (2) the administrative officer or agency in arriving at its determination departed from the applicable rules of law, (3) the determination was supported by the findings, and (4) the determination was arbitrary and capricious (305 U. S. at 185, 187).

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a statute authorizing the President to call out the militia whenever the United States shall be invaded or be in imminent danger of invasion was to make the President the sole and final judge of the necessity for acting thereunder.

X

Petitioners may not claim for themselves the immunity of the United States from suit and thereby prevent respondents from maintaining this action.

A. This suit is within the general rule that a public officer charged with injuring private rights by action in excess of his authority may not shelter himself behind the immunity of the sovereign.

The decision below in no way conflicts with the rule that the United States may not be sued, without its consent, either directly or in an action nominally against a public officer, but in which the decree sought would have the effect of one entered in a suit brought directly against it.[1]

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[1] *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387. The Court will assume that the allegations of the complaint have been proven and will then, on the basis of the assumption, decide whether the United States is a necessary party in view of the manner in which its interests would be "affected" by the decree sought. *Ickes* v. *Fox*, 300 U. S. 82, 96; *Northern Pac. Ry. Co.* v. *State of North Dakota*, 250 U. S. 135, 152. The problems involved are similar to those arising when the defense of the Eleventh Amendment is raised, and cases in one field are authorities in the other. See *Minnesota* v. *Hitchcock*, *supra*, at 387; *Hopkins* v. *Clemson Agricultural College*, 221 U. S. 636, 646. In considering whether the relief sought in a particular suit is of such a nature, the Court is not inclined to extend the application of the doctrine of sovereign immunity. See *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U. S. 381, 391, and *Federal Housing Administration* v. *Burr*, . . . U. S. . . ., 60 Sup. Ct. 488.

The principle has long been established [2] that a suit against a public officer is not one against the sovereign, where, as here, the gravamen is invasion or threatened invasion of the legal rights of the complainant by affirmative action in excess of the officer's authority and the real object is an injunction restraining or undoing such action.

The reason is clear. The acts of public officials must be justified by authority conferred by law.[3] When, therefore, an official takes or threatens affirmative action in excess of his authority which invades or will invade the legal right of another, his act is personal in nature and derives no official justification from being done in asserted agency

[2] *Osborn* v. *The Bank of United States*, 9 Wheat. 738; *Davis* v. *Gray*, 83 U. S. 203; *Pennoyer* v. *McConnaughy*, 140 U. S. 1; *Ex parte Tyler*, 149 U. S. 164; *Scranton* v. *Wheeler*, 179 U. S. 141; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Ex parte Young*, 209 U. S. 123; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605; *Waite* v. *Macy*, 246 U. S. 606; *Colorado* v. *Toll*, 268 U. S. 228; *Ickes* v. *Fox*, 300 U. S. 82.

[3] "The acts of all of its officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 108. "A defendant sued as a wrong-doer, who seeks to substitute the state in his place, or to justify by the authority of the state, or to defend on the ground that the state has adopted his act and exonerated him, cannot rest on the bare assertion of his defense. * * * It is necessary, therefore, for such a defendant, in order to complete his defense, to produce a law of the state which constitutes his commission as its agent, and a warrant for his act." *Poindexter* v. *Greenhow*, 114 U. S. 270, 288. "If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law." *Marbury* v. *Madison*, 1 Cranch 137, 170.

for the United States.[4] Consequently, a decree in a suit brought to defend against such invasion, actual or threatened, and which merely enjoins, or compels the official to undo, such personal action, does not affect the United States.

In *Philadelphia Company* v. *Stimson*, 223 U. S. 605, an action was brought in the Supreme Court of the District of Columbia to set aside certain harbor lines established by the Secretary of War and to enjoin him from causing criminal proceedings to be instituted by the District Attorney against the complainant because of its intended reclamation and occupation of lands outside of such harbor lines. Under the statutes involved, the Secretary of War was given authority to establish harbor lines "where it is made manifest to the Secretary of War that the establishment of harbor lines is essential to the preservation and protection of harbors." Such statutes made the violation of harbor lines so established a misdemeanor and made it the duty of district attorneys of the United States to prosecute all offenders "whenever requested by the Secretary of War".

The Secretary of War demurred on the ground, among others, that the suit was "virtually" one against the United States. The Court, in overruling that contention, stated as follows the rule which governs this case (619-620):

> "The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. [Citing cases.] And in case of an injury threatened by his illegal action, the officer cannot claim immu-

[4] *Goltra* v. *Weeks*, 271 U. S. 536, 544.

nity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments. [Citing *Ex parte Young*, 209 U. S. 123, and other cases.] *And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred.* [Citing cases.]

"The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. *The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States.*" [Italics added.]

Many, if not most, of the occasions for the application of these principles have arisen in cases involving actions by public officials who asserted that they were carrying on the "general" or "basic activities" of government in fields not generally considered to be "regulatory" in character. (Br., pp. 73, 80). Illustrative of suits held not to be against the United States (or a State) are suits to enjoin the Secretary of the Interior from requiring a land claimant to comply with an allegedly unauthorized condition prior to consideration of a claim to public lands;[5] to dispossess military officers occupying, for army purposes and under claim of title in the United States, property alleged to belong to the plaintiff;[6] to prevent the allegedly unauthorized fixing by a Federal officer of charges

[5] *Work* v. *Louisiana*, 269 U. S. 250. See also *Santa Fe Pac. R. Co.* v. *Lane*, 244 U. S. 492.

[6] *United States* v. *Lee*, 106 U. S. 196. See also *Tindal* v. *Wesley*, 167 U. S. 204.

of railroads in the possession and control of, and whose revenues belonged to, the United States under the war power;[7] to enjoin repossession of boats in alleged violation of a lease thereof by the United States;[8] and to enjoin a levy upon property, or to restore property taken to satisfy a state tax in alleged impairment of contract.[9]

Work v. *Louisiana*, 269 U. S. 250, involved certain Acts of Congress which granted to the State of Louisiana the "swamp and overflowed lands" within its borders and provided, in substance, that it should acquire title thereto upon the approval by the Secretary of the Interior of a list describing such lands.

While proceedings for the approval by the Secretary of a list of certain lands were pending, such lands were included in a petroleum withdrawal made by Presidential order under another Act of Congress. The Secretary thereafter ruled that mineral lands did not inure to the State under the swamp land grants, that the lands in question had been impressed with a *prima facie* mineral character by the withdrawal order and that the State must prove their non-mineral character before he would undertake to decide whether such lands were otherwise "swamp and overflowed".

The State thereupon filed its bill in equity, alleging that the Secretary had exceeded his authority and jurisdiction in making such ruling and imposing such requirement and praying that he

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[7] *No. Pac. Ry. Co.* v. *North Dakota*, 250 U. S. 135. See also *Dakota Cent. Telephone Co.* v. *South Dakota*, 250 U. S. 163.

[8] *Goltra* v. *Weeks*, 271 U. S. 536.

[9] *Allen* v. *B. & O. R. Co.*, 114 U. S. 311. See also *Poindexter* v. *Greenhow*, 114 U. S. 270.

be enjoined from taking further action to enforce the ruling and be required to vacate it and set it aside.

The Secretary urged that the Court was without jurisdiction to entertain the bill, upon the grounds, first, that it was prematurely brought before the Secretary had exercised his jurisdiction to determine the character of the land, and, second, that the United States was an indispensable party. This Court rejected both contentions.

As to the first, the Court pointed out (269 U. S. at 254) that the State did not seek an adjudication that the lands in question were swamp and overflowed lands but sought *merely* to restrain the Secretary from rejecting its claim upon an unauthorized ruling of law illegally requiring it, as a condition precedent, to show that such lands were non-mineral in character.

As to the second contention, the Court said (*ibid.*):

> "It is clear that if this order exceeds the authority conferred upon the Secretary by law and is an illegal act done under color of his office, he may be enjoined from carrying it into effect. * * * A suit for such purposes is not one against the United States, even though it still retains the legal title to the lands, and it is not an indispensable party."

The Court then held that the Acts of Congress under consideration had granted swamp and overflowed lands whether or not mineral in character. Therefore, in requiring the State to establish their non-mineral character, the Secretary had "exceeded the authority conferred upon him by the Acts and attached this condition to the prosecution

of the claim of the State without warrant of law" (269 U. S. at 260). Because the State had not as yet finally established its title to such lands and "the administrative processess necessary thereto" were not complete, the Court modified the decree below so as to strike therefrom a clause which in effect would have restrained the Secretary from determining whether such lands were in fact swamp and overflowed.[10]

Petitioners attempt to distinguish *Work* v. *Louisiana, supra*, upon the ground (Br., p. 85) that title, use and possession of the swamp lands were not affected thereby—that the relief granted "may have changed the action of the Secretary, but it did not change the position of the United States or affect its interest". It is true that the relief granted did not change the position of the United States or affect its interests within the meaning of the immunity rule. The reason, however, was that, upon examination of the law, the Court found that *Congress had not imposed or authorized to be imposed* (although the Secretary of the Interior was attempting to impose), as a condition to consideration of the State's claim to public lands, the requirement that such lands be shown to be non-mineral. Just so, the relief sought

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[10] In *Santa Fe Pac. R. Co.* v. *Lane*, 244 U. S. 492, the Secretary of the Interior was enjoined from insisting upon or giving effect to a demand that the grantee of a railroad land grant make an advance deposit to cover the entire cost of surveying a township in which such grantee was entitled to the odd-numbered sections after they should have been surveyed. The Court held that the Secretary had "plainly exceeded his authority" and could be enjoined from enforcing his demand since it was "an unauthorized act, done under color of office". (244 U. S. at 497.)

in this suit will not affect the position or interests of the United States if, upon examination of the law, the Court finds that *Congress has not imposed or authorized to be imposed* upon bidders for Government contracts the condition which petitioners are seeking to impose.

The petitioners in this suit may not prevent the Court from examining into the legality of their acts any more than the defendants in *Work* v. *Louisiana* were able to prevent examination of the legality of theirs.

B. The relief sought in this suit will not compel the United States either to fix the terms of Government contracts or specifically to perform them; nor will it deprive the United States of the title to or use of its property.

Petitioners assert that a suit for an injunction or mandamus specifically to enforce a contract of the United States is a suit against the United States, and that consequently the present suit is likewise one against the United States since the effect of the relief sought is to compel the United States to fix the terms and conditions of its contracts (Br., p. 76).[11]

But this is a *non sequitur*.[12] Respondents are

[11] Petitioners state that the "same logic" has prevailed in several State cases which they cite (Br., p. 78), but none of which is in point.

[12] Moreover, the argument, at its best, is only an attempt to obliterate the distinction, on which this Court has always insisted, between the compelling and enjoining of action. The distinction is pointed by a comparison of *Hagood* v. *Southern*, 117 U. S. 52, and *United States ex rel. Shoshone Irrigation District* v. *Ickes*, 70 Fed. (2d) 771 with *Goltra* v. *Weeks*, 271 U. S. 536, and *Pennoyer* v. *McConnaughy*, 140 U. S. 1, and of *State of North Carolina* v. *Temple*, 134 U. S. 22, with *Humphrey* v. *Pegues*, 83 U. S. 244.

not seeking to compel the United States to do anything, directly or indirectly. They are merely trying to prevent *petitioners* from imposing, under color of office, conditions in Government contracts which Congress has not authorized and the imposition of which is, indeed, contrary to the statutes of the United States. Far from attempting to compel the United States to fix the terms and conditions of its contracts, respondents are trying to prevent the insertion in such contracts of terms and conditions which the United States, speaking through Congress, has declared should not be included therein.

It is thus evident that, even if the cases relied on by petitioners do hold that a suit for an injunction or mandamus specifically to enforce a contract of the United States is a suit against the United States,[13] such cases, nevertheless, have no relevancy here.

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[13] It is by no means clear that such cases (Br., pp. 76-77, n. 63, 64) do so hold. They probably hold only that where the gravamen of a complaint is that the action of an individual defendant has been or will be a wrong in that it is or will be a breach by the United States of a contractual obligation, and it does not appear that such defendant has exceeded, or threatens to exceed, his statutory authority, the suit is one against the sovereign. Thus, *Wells* v. *Roper*, 246 U. S. 335; *Transcontinental & Western Air, Inc.* v. *Farley*, 71 Fed. (2d) 288, and *Johnstown Coal & Coke Co.* v. *Wilson*, 60 Fed. (2d) 557, involved attempts to restrain or control the acts of administrative officials *within the scope of their authority* (see opinion below, R. 396, n. 61, 64). There is a distinction, it is submitted, between lack of statutory authority and presence of statutory, but unconstitutional, authority. In the latter case, it seems apparent that a suit which seeks to enforce a contract which the sovereign has attempted to annul by an unconstitutional statute is a suit against the sovereign. Even in

Equally as inapplicable as such contract cases are the cases cited by petitioners (Br., p. 78, n. 65, 66) to the effect that a suit which seeks to deprive the United States of the title to or the use of its property may not be maintained.[14] Obviously, respondents are not attempting to deprive the United States of the title to or the use of its property and petitioners apparently so concede (Br., p. 78).

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such a case, however, this Court has gone far in permitting practical but indirect enforcement. See, for example, *Poindexter* v. *Greenhow*, 114 U. S. 270 (detinue will lie to recover property taken to pay a tax, the tax collector having caused a breach of a State's contract by refusing to accept bond coupons in payment of such tax); *Pennoyer* v. *McConnaughy*, 140 U. S. 1 (state land commissioners enjoined from selling land after state statute purported to cancel plaintiff's contract of purchase); and *Wright* v. *Georgia R. and B. Co.*, 216 U. S. 420 (officials enjoined from enforcing tax levied in breach of contract not to tax). Where, however, there is no constitutional question, it seems that an officer might, in a proper case, either be ordered to perform a contract, by analogy to cases such as *Miguel* v. *McCarl*, 291 U S. 442; *Houston* v. *Ormes*, 252 U. S. 469; and *Mellon v. Orinoco Iron Co.*, 266 U. S. 121; or be enjoined from causing a breach thereof, since the writs of injunction and mandamus are sometimes correlative, *Noble* v. *Union River Logging R. Co.*, 147 U. S. 165, 171-172. It is true that a "proper case" would probably rarely arise, since in the normal run of things an executive officer has, by virtue of his general powers, a discretion (uncontrollable by the courts) to see that the United States either performs a contract or breaches it, being then subject to suit in the Court of Claims.

[14] It may be noted, however, that (probably because of the general antipathy for the doctrine of sovereign immunity) the exception stated in the text is rather narrowly confined. For example, compare *United States* v. *Lee*, 106 U. S. 196, with *Stanley* v. *Schwalby*, 162 U. S. 255, and *Houston* v. *Ormes*, 252 U. S. 469, with *Goldberg* v. *Daniels*, 231 U. S. 218.

C. The relief sought in this suit will not interfere with the general activities of the United States.

Petitioners virtually repeat their argument in their broad contention (Br., pp. 79-80) that the relief sought by the respondents constitutes interference with the general activities of the United States.

This argument stands on the same legal footing as that which we have already answered. The relief sought herein will in no sense interfere with the general activities of the United States. It seeks only to restrain the illegal action of petitioners taken or threatened to be taken in violation of the acts of Congress.

And from a practical standpoint the argument is repudiated by the recorded experience (pp. 191-192, *supra*) of Government contracting agencies since the granting of the temporary relief sought in the complaint.

Respondents place chief reliance on the case of *Louisiana* v. *McAdoo*, 234 U. S. 627. In that case, wherein the plaintiff sought to make the defendant, in the name of the United States, collect taxes, there could be no thought that the defendant was being sued as an individual in a "defensive" suit to prevent (or compel the retraction of) action taken in excess of statutory authority.[15] On the contrary, the opinion clearly shows that the Court regarded the suit as one wherein the plaintiff sought to compel the defendant, in the name of the United States, to collect a tax. The suit really

[15] Petitioners, in another portion of their brief (Br., p. 29), seem to suggest that the case really rests on the same basis as *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, and we are not inclined to disagree with that suggestion.

was in the nature of a mandamus, and the decision seems more properly placed on the second ground stated by the Court (and in which alone Mr. Justice McKenna concurred), namely, that the duties imposed on the Secretary of the Treasury by the statutes in question were not ministerial, and that therefore mandamus would not lie.[16]

That *Louisiana* v. *McAdoo* does not lay down any such broad and indefinite rules as petitioners claim is evident from the fact that cases challenging the validity of far-reaching taxing programs [17] have not been thought to be barred by the rule of sovereign immunity.[18] Nor have suits involving the extent of the power of officials managing properties taken over by the United States under its war powers [19] or suits questioning acts of officials in administering the public lands [20] and public irrigation projects.[21]

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[16] It seems, indeed, that the jurisdictional question of sovereign immunity has no proper place in mandamus actions or their modern equivalent under the Rules of Civil Procedure. Inasmuch as the theory on which a writ of mandamus (or decree of like effect) is granted must be that the sovereign is thereby compelling its officer to do his duty, the only issue should be whether the command of the sovereign is plain and unmistakable.

[17] As is indicated by petitioners (Br., p. 70), it is as necessary for the United States to tax as for it to buy and to contract.

[18] See, e.g., *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, and *Carter* v. *Carter Coal Co.*, 298 U. S. 238.

[19] *Northern Pac. Ry. Co.* v. *State of North Dakota*, 250 U. S. 135; *Dakota Cent. Telephone Co.* v. *State of South Dakota*, 250 U. S. 163; *Burleson* v. *Dempcy*, 250 U. S. 191.

[20] *Work* v. *Louisiana*, 269 U. S. 250; *Santa Fe Pac. R. Co.* v. *Lane*, 244 U. S. 492.

[21] *Ickes* v. *Fox*, 300 U. S. 82; *Ickes* v. *Virginia-Colorado Development Corporation*, 295 U. S. 639.

In any event, even if *Louisiana* v. *McAdoo* established any test as indefinite as "serious interference with the general activities of the Government", the instant suit is not thereby barred, because, as stated above, it seeks only to interfere with the activities of *petitioners*. Since those activities are in violation of law, petitioners in carrying them on are not the Government, but merely individuals purporting to act as the Government, and interference with their activities is consequently not interference with the activities of the Government. On the contrary, the injunction sought in this suit would prevent petitioners from unlawfully interfering with the purchasing functions of the Government. It comes with poor grace from petitioners, therefore, to seek, as they do here, to avoid an inquiry of the merits, because, as they contend, such an inquiry may in some vague and undefined way interfere with the activities of the Government.

D. Since the acts of petitioners of which respondents complain are unauthorized by law and invade respondents' rights, it is immaterial whether such acts involve "regulatory" or "non-regulatory" functions, as in either case this suit is not one against the United States.

Petitioners concede that a suit which seeks to restrain an unauthorized regulation by a public officer is not a suit against the United States but only against the officer who has exceeded his authority (Br., p. 73).

Petitioners, however, contend that their actions challenged in this suit are not "regulatory" and

that, therefore, the cases relied on by respondents are not applicable here.

The reason advanced by petitioners for this distinction is that, although the United States may be supposed to have no interest in the enforcement of an invalid "regulation", it does have an interest in its property or contracts which would be affected by the restraint of acts relating thereto, even though illegal. (Br., p. 82).[22]

We have already shown that many, if not most, of the occasions for the application of the principle asserted by respondents in this action have arisen in cases involving action by public officials who asserted that they were carrying on the necessary functions of Government in fields not generally considered to be regulatory in character.[23] The obvious reason why that principle has been applied on those occasions as well as others is that, if the rights of a private person are invaded by action taken by a public official in excess of the authority and jurisdiction conferred on him by law, the injury is none the less real because such official claims that he is carrying on the business of the Government.

Petitioners, moreover, do not attempt to pursue

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[22] Petitioners' argument presupposes that their illegal action is not "regulatory" in character. The Public Contracts Act, however, does not seek, in its wage provisions, to further any "proprietary" interest of the United States. On the contrary, it seeks to regulate a particular class of persons, i.e., Government contractors, with respect to the wages paid to their employees engaged in the performance of Government contracts.

[23] Cases cited in notes 5-9, 242-243, *supra*. Of the six cases cited by petitioners (Br., p. 81, n. 67) as involving "solely the regulatory functions", three concerned action

the distinction which they suggest between regulatory and non-regulatory functions. They admit that suits to restrain the affirmative acts of public officers taken in excess of their authority and which invade the legal rights of others have been maintained although the "property interests of the Government were to some extent involved" (Br., p. 83).[24] This reluctant admission makes evident the difficulties into which petitioners are led by their argument that the principle asserted by respondents is only applicable in a "regulatory" field; and those difficulties are made more apparent by their futile attempt to explain the cases which support respondents' position.

Petitioners' failure successfully to distinguish *Work* v. *Louisiana* has already been noted (p. 245, *supra.*). They also fail to shake respondents' position by intimating (Br., p. 86) that the part of the opinion in *Northern Pac. Ry. Co.* v. *State of North Dakota*, 250 U. S. 135, which embarrasses them is dictum[25]; and their suggestion (Br., p.

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in fields not generally considered to be regulatory in character. *Waite* v. *Macy*, 246 U. S. 606 (importing); *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S., 94 (postoffice); and *Gegiow* v. *Uhl*, 239 U. S. 3 (immigration).

[24] *United States* v. *Lee*, 106 U. S. 196; *Work* v. *Louisiana*, 269 U. S. 250; *Santa Fe Pac. R. Co.* v. *Lane*, 244 U. S. 492; *Lane* v. *Watts*, 234 U. S. 525; *Northern Pac. Ry. Co.* v. *State of North Dakota*, 250 U. S. 135; *Ickes* v. *Fox*, 300 U. S. 82; and other cases.

[25] *Northern Pac. Ry. Co.* v. *State of North Dakota*, *supra*, was a suit against the Director General of Railroads, it being alleged that he had exceeded his statutory authority in fixing charges for the railroads the possession and control of which had been taken over by, and the revenues of which inured to, the United States under its war powers. The Court referred to *Louisiana* v.

87) that a State may have what is in effect a "special right" to sue the United States is unsupported by authority and unsound on principle.

Petitioners say, in substance, that *Lane* v. *Watts*, 234 U. S. 525, and *Ickes* v. *Fox*, 300 U. S. 82, did not affect any interests of the United States because in each of those cases the Court found on the merits [26] that the defendant's claim of statutory authority was unsound (Br., p. 86). Such alleged distinctions can mean only that petitioners maintain the untenable proposition that the interests of the United States will be affected if its agents are prohibited from inserting in its contracts provisions which it does not want inserted therein.

Again, petitioners say (somewhat inconsistently) that *Colorado* v. *Toll*, 268 U. S. 228, is not in point because, since the State there asserted that the United States did not have certain rights, a determination that such assertion was correct would necessarily prevent an injunction from affecting United States property. It is, we submit, equally obvious that a decision that respondents herein are correct in their assertion of the invalidity of petitioners' actions would necessarily prevent any injunction herein from affecting the United States.

It is thus abundantly clear that the present ac-

McAdoo, 234 U. S. 627, and other cases relied on by petitioners, but held that the suit was not one against the United States, because the principle of those cases could only be applied by giving effect to the conclusion reached by the Court as to the legality of the defendant's acts and "to decide [that] question the United States was not a necessary party" (250 U. S. at 152).

[26] The opinion in *Ickes* v. *Fox* seems clearly to show (300 U. S. at 96) that the jurisdictional question was decided in the usual way, i.e., upon an assumption that the allegations of the complaint could be proven.

tion falls within the principle long established that a suit against a public officer is not one against the sovereign where the gravamen is invasion or threatened invasion of the legal rights of the complainant by affirmative action in excess of the officer's authority and the real object is an injunction restraining or undoing such action; and that, accordingly, petitioners may not shelter themselves under the immunity of the United States and thereby prevent respondents from maintaining this action.

XI.

The complaint clearly sets forth facts sufficient to entitle respondents to injunctive relief.

Petitioners contend that, even though this is not a suit against the United States and even though respondents have a standing to maintain the action, respondents are not entitled to injunctive relief, because they do not allege that, if permitted to bid upon the proposed contracts described in the complaint free of the unlawful Determination, they would be awarded such contracts, and that, if awarded such contracts, they would realize a profit therefrom which they could not realize elsewhere (Br., pp. 87-90).

The facts set forth in the complaint, showing the threatened unlawful invasion of respondents' rights and the immediate and irreparable injury that would result therefrom unless the injunctive relief prayed were granted, are summarized at pages 24 to 28 hereof.

Here again (see p. , *supra*) petitioners confuse the measure of proof necessary to show the amount of damages recoverable in an action at law with the probability of injury required to be shown in order to establish a need for injunctive relief.

In a suit for injunctive relief to prevent unlawful interference with business relations or prospective customers, it has never been supposed that the plaintiff must show of a certainty that, except for the unlawful interference, the business relations would ripen into profitable contracts or the prospective customers would become certain purchasers at profitable prices. By the very nature of the case it is sufficient that the plaintiff show

no more than a reasonable probability of irreparable injury from the unlawful interference.

It is the unlawful interference with the *opportunity* to carry on business that constitutes the gravamen of the wrong threatened by petitioners.[1] It must necessarily be inferred, on the basis of human experience, that if that opportunity be interfered with damage will result. No one, of course, can ever do more than to establish the *probability* of what he will be able to do in the future.

The complaint here alleges facts sufficient to show that, if respondents could bid for such contracts free of the restrictions imposed by the unlawful Determination, they would, in the normal course of events, probably be the lowest bidders on, and be awarded, substantial amounts thereof. That is the necessary inference from the past experience of respondents in bidding on and obtaining Government contracts, which have been substantial in amount and profitable.[2]

Since petitioners have not attempted to argue in this Court that respondents had any plain and adequate remedy other than a suit for injunctive relief, we content ourselves with referring to the allegations in the complaint (R. 33-38, 316-317) and to the full discussion of that point in the opinion of the court below (R. 400-404).

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[1] See *Traux* v. *Raich*, 239 U. S. 33, and *Pierce* v. *Society of Sisters*, 268 U. S. 510. Unlawful interference with an opportunity for a prize or gratuity will support an action for damages. Restatement of Torts (1939) § 912 f; *Keeble* v. *Hickeringill*, 11 East 574 (K. B.).

[2] This probability based upon past experience is confirmed by the public records of petitioner Perkins herself, which show that, since the granting of the injunction by the court below, various respondents have received substantial amounts of Government contracts (see p. 24, *supra*).

XII.

The court below correctly held that respondents are entitled to a declaratory judgment declaring the invalidity of the determination.

Even if this Court should hold that respondents have not made a sufficient showing of irreparable injury to entitle them to the injunctive relief awarded them by the court below, there can be no doubt that they are nevertheless entitled to a declaratory judgment[1] under the Declaratory Judgment Act.[2]

This is fully supported by the recent decision in *Perkins* v. *Elg*, 307 U. S. 325. In that case a person who had been born in this country of naturalized parents was threatened with deportation by the Secretary of Labor and the Commissioner of Immigration on the ground that she was not a citizen of the United States because of her removal during minority to her parents' homeland. For the same reason the Secretary of State refused her application for an American passport. She sought a declaratory judgment that she was a citizen of the United States,

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[1] "As the prayer for relief by injunction is not a necessary prerequisite to the exercise of judicial power, allegations of threatened irreparable injury which are material only if an injunction is asked, may likewise be dispensed with if, in other respects, the controversy presented is, as in this case, real and substantial." *Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249, 264. See also *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 241.

[2] Section 274(d) of the Judicial Code, 28 U. S. C. § 400. Petitioners have not attempted to deny, and, indeed, they apparently concede (Br., pp. 153-154), that there exists in this case an "actual controversy" within the meaning of that Act.

an injunction against the Secretary of Labor and the Commissioner of Immigration restraining them from proceeding with her deportation, and an injunction against the Secretary of State from refusing to issue to her a passport upon the ground that she was not a citizen.

Upon motion, the District Court dismissed the complaint as to the Secretary of State, because of his official discretion in the issue of passports, but refused to do so as to the Secretary of Labor and the Commissioner of Immigration, and entered a decree declaring the plaintiff to be a citizen of the United States. The Court of Appeals affirmed the decree. This Court, however, modified the decree so as to strike out the portion dismissing the bill of complaint as to the Secretary of State and so as to include him in the declaratory provision of the decree, saying (307 U. S. at 349-350):

> "The dismissal [as to the Secretary of State] was upon the ground that the court would not undertake by mandamus to compel the issuance of a passport or control by means of a declaratory judgment the discretion of the Secretary of State. But the Secretary of State, according to the allegation of the bill of complaint, had refused to issue a passport to Miss Elg 'solely on the ground that she had lost her native born American citizenship'. The court below, properly recognizing the existence of an actual controversy with the defendants (Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 57 S. Ct. 461, 81 L. Ed. 617, 108 A. L. R. 1000), declared Miss Elg 'to be a natural born citizen of the United States' (99 F. 2d 414) and we think that the decree should include the Secretary of State as well

> as the other defendants. *The decree in that sense would in no way interfere with the exercise of the Secretary's discretion with respect to the issue of a passport but would simply preclude the denial of a passport on the sole ground that Miss Elg had lost her American citizenship.*" [Italics ours.]

The similarity of the *Elg* case to the instant one is apparent, since respondents here seek a judicial declaration that will preclude the rejection of their bids, without consideration, for an unlawful reason, but which does not seek to control the discretion of petitioners.

Smith-Brooks Printing Co. v. *Young*, 103 Colo. 199, 85 Pac. (2d) 39, is an authority almost squarely in point for the granting of a declaratory judgment in this case. In that action, brought under the Uniform Declaratory Judgments Act,[3] a prospective bidder on State printing contracts to be let to the lowest responsible bidder secured a declaratory judgment as to the validity of the action of the Colorado Industrial Commission in determining the prevailing rate of wages to be paid to employees engaged on such contracts, and as to the validity of the statute under which said Commission had made such determination.[4]

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[3] Colorado Laws 1923, p. 268. Colorado courts require the existence of a controversy, just as it is a prerequisite of federal jurisdiction. *Denver* v. *Lynch*, 92 Colo. 102, 18 Pac. (2d) 907; *Gabriel* v. *Bd. of Regents*, 83 Colo. 582, 267 Pac. 407.

[4] See also *Currin* v. *Wallace*, 306 U. S. 1, and *United States* v. *Farley*, 18 F. Supp. 75 (D. C., D. of Col.) [proceeding for judgment declaring plaintiff's classification status as a postal employee].

Professor Borchard has described declaratory judgments as being peculiarly appropriate in the determination of questions of administrative law: [5]

> "Possibly in no branch of litigation has the declaratory procedure proved more useful than in the relations between the citizen and the administration. With the growing complexity of government and the constantly increasing invasion of private liberty, with ever widening powers vested in administrative boards and officials, the occasions for conflict and dispute are rapidly augmenting in frequency and importance. Yet the very fact that such disputes turn mainly on questions of law, involving the line marking the boundary between private liberty and public restraint, between private privilege and immunity, on the one hand and public right and power on the other, makes this field of controversy peculiarly susceptible to the expeditious and pacifying administrations of the declaratory judgment."

The discretion entrusted to the courts with respect to the granting of relief under the De-

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[5] Borchard, Declaratory Judgments 1939, 9 Brooklyn L. Rev. 1, 22. See *Quinones* v. *Landron*, 99 Fed. (2d) 618, 620 (C. C. A. 1st): "There can be no doubt that one of the benefits contemplated by the Uniform Declaratory Judgment Act was the opportunity afforded to settle disputes arising over the powers, duties and privileges of administrative officers, especially if the disagreement involved the construction of a statute." It has also been pointed out that the construction of statutes is not weighted with the acute social and political questions which inhere in many constitutional controversies, and that consequently the propriety of declaratory relief should not present any particular difficulties. Moore's Federal Practice (1939), § 57.03, p. 3221.

claratory Judgment Act is one which should be exercised with a view to affording a speedy determination of legal rights without the necessity of awaiting an actual disturbance of relationships.[6]

Petitioners urge (Br., p. 155) that "a proper regard for the public interest in this controversy requires the conclusion that the contracting and purchasing functions of the Government be not subjected to interference at the suit of prospective bidders". We believe, and have shown (pp. 256-257, *supra*), that petitioners' so-called practical arguments against the granting of injunctive relief in this action are of little merit. Such arguments are of even less merit when addressed to the granting of a declaratory judgment.

It is evident that a suit for such a judgment cannot interfere with any contracting officer. If, as in this case, the dispute is one of principle, involving a question of law as to whether certain actions are beyond the jurisdiction and authority of the officials involved, a declaratory judgment will merely declare the law for the future—which, as

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[6] *Aetna Casualty & Surety Co.* v. *Quarles*, 92 Fed. (2d) 321, 325 (C. C. A. 4th); *Ohio Casualty Ins. Co.* v. *Marr*, 98 Fed. (2d) 973, 975 (C. C. A. 10th). Relief in an otherwise appropriate case should be denied only when it will not finally settle the rights of the parties, or if the issues are already involved in other litigation. *Maryland Casualty Co.* v. *Consumers Finance Service*, 101 Fed. (2d) 514, 515 (C. C. A. 3rd). The report of the Committee which reported to the Senate the bill which became the Declaratory Judgment Act (Rept. No. 1005, 73rd Cong., 1st Sess.) stated that the declaratory judgment procedure "has been especially useful in avoiding the necessity, now so often present, of having to act at one's peril or to act on one's own interpretation of his rights, *or abandon one's rights because of a fear of incurring damages.*" [Italics ours.]

petitioners say (Br., p. 154), is all that is required. The discretion of the officials will not be invaded by such a judgment any more than it was in *Perkins* v. *Elg*, *supra*, or in *Work* v. *Louisiana*, pp. 243-245, *supra*.

We do not believe, and we do not think that this Court will believe, that the contracting and purchasing functions of the Government will be improperly hampered, any more than the Government's functions of issuing passports and administering the public lands were improperly hampered in the two cases last cited, by a judicial declaration that certain allegedly official actions are entirely beyond the scope of the authority which Congress has conferred on the officers involved.

CONCLUSION

It is evident for the foregoing reasons that the decision of the court below should be affirmed.

Respectfully submitted,

WM. CLARKE MASON,
O. MAX GARDNER,
FREDERICK H. KNIGHT,
HAROLD F. MCGUIRE,
ROBERTS B. THOMAS,
Counsel for Respondents.

April 1, 1940.

FILED
APR 2 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 593.

FRANCES PERKINS, Individually and as Secretary of Labor of the United States, et al., *Petitioners*,

v.

LUKENS STEEL COMPANY, a corporation, et al., *Respondents*.

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APPENDIX I

[PUBLIC—No. 846—74TH CONGRESS]
[S. 3055]

AN ACT

To provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:

(a) That the contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract;

(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;

(c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, ar-

ticles, or equipment used in the performance of the contract shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week;

(d) That no male person under sixteen years of age and no female person under eighteen years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract; and

(e) That no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this subsection.

SEC. 2. That any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 1 hereof shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, the sum of $10 per day for each male person under sixteen years of age or each female person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; and, in addition, the agency of the United States entering into such contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original

contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in section 1 hereof may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: *Provided*, That no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America.

SEC. 3. The Comptroller General is authorized and directed to distribute a list to all agencies of the United States containing the names of persons or firms found by the Secretary of Labor to have breached any of the agreements or representations required by this Act. Unless the Secretary of Labor otherwise recommends no contracts shall be awarded to such persons or firms or to any firm, corporation, partnership, or association in which such persons or firms have a controlling interest until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred.

SEC. 4. The Secretary of Labor is hereby authorized and directed to administer the provisions of this Act and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary to assist in the administration of this Act and to prescribe rules and regulations with respect thereto. The Secretary shall appoint, without regard to the provisions of the civil-service

laws but subject to the Classification Act of 1923, an administrative officer, and such attorneys and experts, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as he may from time to time find necessary for the administration of this Act. The Secretary of Labor or his authorized representatives shall have power to make investigations and findings as herein provided, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act.

SEC. 5. Upon his own motion or on application of any person affected by any ruling of any agency of the United States in relation to any proposal or contract involving any of the provisions of this Act, and on complaint of a breach or violation of any representation or stipulation as herein provided, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, failure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony

relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is hereby authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of this Act.

SEC. 6. Upon a written finding by the head of the contracting agency or department that the inclusion in the proposal or contract of the representations or stipulations set forth in section 1 will seriously impair the conduct of Government business, the Secretary of Labor shall make exceptions in specific cases or otherwise when justice or public interest will be served thereby. Upon the joint recommendation of the contracting agency and the contractor, the Secretary of Labor may modify the terms of an existing contract respecting minimum rates of pay and maximum hours of labor as he may find necessary and proper in the public interest or to prevent injustice and undue hardship. The Secretary of labor may provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act respecting minimum rates of pay and maximum hours of labor or the extent of the application of this Act to contractors, as hereinbefore described. Whenever the Secretary of Labor shall permit an increase in the maximum hours of labor stipulated in the contract, he shall set a rate of pay for any overtime, which rate shall be not less than one and one-half times the basic hourly rate received by any employee affected.

SEC. 7. Whenever used in this Act, the word "person" includes one or more individuals, partnerships, associa-

tions, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

SEC. 8. The provisions of this Act shall not be construed to modify or amend title III of the Act entitled "An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes", approved May 3, 1933 (commonly known as the Buy American Act), nor shall the provisions of this Act be construed to modify or amend the Act entitled "An Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes", approved March 3, 1931 (commonly known as the Bacon-Davis Act), as amended from time to time, nor the labor provisions of title II of the National Industrial Recovery Act, approved June 16, 1933, as extended, or of section 7 of the Emergency Relief Appropriation Act, approved April 8, 1935; nor shall the provisions of this Act be construed to modify or amend the Act entitled "An Act to provide for the diversification of employment of Federal prisoners, for their training and schooling in trades and occupations, and for other purposes", approved May 27, 1930, as amended and supplemented by the Act approved June 23, 1934.

SEC. 9. This Act shall not apply to purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market; nor shall this Act apply to perishables, including dairy, livestock and nursery products, or to agricultural or farm products processed for first sale by the original producers; nor to any contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof. Nothing in this Act shall be construed to apply to carriage of freight or personnel by vessel, airplane, bus, truck, express, or railway line where published tariff rates are in effect or to common carriers subject to the Communications Act of 1934.

SEPARABILITY CLAUSE

SEC. 10. If any provision of this Act, or the application thereof to any persons or circumstances, is held invalid, the remainder of the Act, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

SEC. 11. This Act shall apply to all contracts entered into pursuant to invitations for bids issued on or after ninety days from the effective date of this Act: *Provided, however*, That the provisions requiring the inclusion of representations with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

Approved, June 30, 1936.

APPENDIX II

No. 504 (Amended as of April 1939).—REGULATIONS PRESCRIBED BY THE SECRETARY OF LABOR UNDER PUBLIC ACT NO. 846, SEVENTY-FOURTH CONGRESS

(SERIES A)

By virtue of the authority vested in the Secretary of Labor by section 4 of the act entitled "An act to provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes" (Act of June 30, 1936, Public, No. 846, 74th Cong.) and in order to establish uniform procedure under said act, the following Regulations are hereby prescribed:

PART I.—CONTRACT STIPULATIONS

ARTICLE 1 (*Insertion of Stipulations*).—Except as hereinafter directed, in every contract made and entered into by an executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States, for the manufacture or furnishing of materials, supplies, articles, and equipment, with respect to which invitations for bids are issued on or after September 28, 1936, the contracting officer shall cause to be inserted in such invitation or the specifications and in such contract, the following stipulations:

Representations and stipulations pursuant to Public Act No. 846, Seventy-fourth Congress:

(*a*) The contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract.

(*b*) All persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the

contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under the contract: *Provided, however*, That this stipulation with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor.

(*c*) No person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract shall be permitted to work in excess of 8 hours in any 1 day or in excess of 40 hours in any 1 week, unless such person is paid such applicable overtime rate as has been set by the Secretary of Labor.

(*d*) No male person under 16 years of age and no female person under 18 years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in the contract.

(*e*) No part of the contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are insanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of the contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this subsection.

(*f*) Any breach or violation of any of the foregoing representations and stipulations shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of the contract, in the sum of $10 per day for each male person under 16 years of age or each female person under 18 years of age, or each convict laborer knowingly employed in the performance of the contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due

to any employee engaged in the performance of the contract; and, in addition, the agency of the United States entering into the contract shall have the right to cancel the same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any adidtional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of the contract as set forth herein may be withheld from any amounts due on the contract or may be recovered in a suit brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: *Provided*, That no claims by employees for such payments shall be entertained unless made within 1 year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America.

(*g*) The contractor shall post a copy of the stipulations in a prominent and readily accessible place at the site of the contract work and shall keep such employment records as are required in the Regulations under the act available for inspection by authorized representatives of the Secretary of Labor.

(*h*) The foregoing stipulations shall be deemed inoperative if this contract is for a definite amount not in excess of $10,000.

ART. 2 (*Statutory Exemptions*).—Inclusion of the stipulations herein enumerated is not required in the following instances:

(*a*) Where the contracting officer is authorized by statute or otherwise to purchase in the open market without advertising for proposals;

(*b*) Where the contract relates to perishables, including dairy, livestock, and nursery products ("perishables" cover products subject to decay or spoilage and not products canned, salted, smoked, or otherwise preserved);

(*c*) Where the contract relates to agricultural or farm

products processed for first sale by the original producers;

(*d*) Where the contract is by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof;

(*e*) Where the contract is with a common carrier for carriage of freight or personnel by vessel, airplane, bus, truck, express, or railway line, where published tariff rates are in effect;

(*f*) Where the contract is for the furnishing of service by radio, telephone, telegraph, or cable companies, subject to the Federal Communications Act of 1934.

PART II.—ADMINISTRATIVE REGULATIONS

ART. 101 (*Manufacturer or Regular Dealer*).—A bidder or contractor shall be deemed to be a "manufacturer" or "regular dealer" within the meaning of the stipulation required by section 1 (a) of the act and article 1 (a) of these Regulations if he falls within one of the following categories:

(*a*) A manufacturer is a person who owns, operates, or maintains a factory or establishment that produces on the premises the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

(*b*) A regular dealer is a person who owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles, or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and sold to the public in the usual course of business.

(1) A regular dealer in lumber and timber products, if a wholesale lumber dealer, may be a person who owns, operates, or maintains a place of business in which the materials, supplies, articles, or equipment of the general character described by the specifications and required under the contract are bought for the account of such person and sold to the public in the usual course of business: *Provided*, That at least more than 50 percent of his business is such purchase and sale of such materials, supplies, articles, or equipment: and, *Provided further*, That

upon all orders to manufacturers for direct shipment to the United States he agrees to insert a notice to the manufacturer to the effect that the supplies are purchased for the United States and that the manufacturer is within the terms of article 104 of these Regulations requiring compliance with the provisions of the Public Contracts Act.

(2) A regular dealer in coal may be a person who owns, operates, or maintains a place of business in which the materials, supplies, articles, or equipment of the general character described by the specifications and required under the contract are bought for the account of such person and sold to users or other trade outlets in the usual course of business in lots of not less than a cargo or railroad carload.

(3) A machine tool dealer may be a person possessing, through contract or agreement with a manufacturer, the responsibility for selling that manufacturer's products, with respect to a specific territory and who is authorized by such manufacturer to offer its products and to negotiate and conclude contracts for the furnishing thereof: *Provided*, That upon all orders to manufacturers for direct shipment to the United States he agrees to insert a notice to the manufacturer to the effect that the supplies are purchased for the United States and that the manufacturer is within the terms of article 104 of these Regulations requiring compliance with the provisions of the Public Contracts Act.

(4) A regular dealer in hay, grain, feed, or straw may be a person who owns, operates, or maintains a store, warehouse, or other place of business in which the materials, supplies, articles, or equipment of the general character described by the specifications and required under the contract are bought for the account of such person and sold to the public in the usual course of business, and whose principal business is such purchase and sale of such materials, supplies, articles, or equipment.

Except as hereinafter provided, every bid received from any bidder who does not fall within one of the foregoing categories shall be rejected by the contracting officer.

Whenever justice and the public interest will be served, bids for a contract or class of contracts will be exempted

from the foregoing requirement by the Secretary of Labor upon the request of the head of the contracting agency or department when accompanied by his finding of fact that it will be so difficult to obtain satisfactory bids for the contract or class of contracts under the stipulated restrictions, that the conduct of Government business will be seriously impaired.

ART. 102 (*Employees Affected*).—The stipulations shall be deemed applicable only to employees engaged in or connected with the manufacture, fabrication, assembling, handling, supervision, or shipment of materials, supplies, articles, or equipment required under the contract and shall not be deemed applicable to office or custodial employees.

ART. 103 (*Overtime*).—Employees engaged in or connected with the manufacture, fabrication, assembling, handling, supervision, or shipment of materials, supplies, articles, or equipment used in the performance of the contract may be employed in excess of 8 hours in any 1 day or in excess of 40 hours in any 1 week, provided such persons shall be paid for any hours in excess of such limits the overtime rate of pay which has been set therefor by the Secretary of Labor.

Until otherwise set by the Secretary of Labor the rate of pay for such overtime shall be one and one-half times the basic hourly rate or piece rate received by the employee.

If in any 1 week or part thereof an employee is engaged in work covered by the contractor's stipulations, his overtime shall be computed after 8 hours in any 1 day or after 40 hours in any 1 week during which no single daily total of employment may be in excess of 8 hours without payment of the overtime rate.

ART. 104 (*Dealer as Agent of Undisclosed Principal*).—Whenever a dealer, to whom a contract within the act and Regulations has been awarded, causes a manufacturer to deliver directly to the Government the materials, supplies, articles, or equipment required under the con-

tract, such dealer will be deemed the agent of the manufacturer in executing the contract. As the principal of such agent the manufacturer will be deemed to have agreed to the stipulations contained in the contract.

ART. 201 (*Breach of Stipulations*).—Whenever the Department of Labor notifies the head of a contracting agency that a contractor is liable for liquidated damages by reason of a breach of stipulations as provided in section 2 of the act, there shall be withheld from any balance due under the contract such amount as may be necessary to satisfy such liability pending final disposition of the case.

Whenever a final determination of a breach of stipulations is made, the Secretary of Labor will furnish to the contracting agency a copy of the findings and decision with such recommendations as will assist the contracting agency in determining whether or not the contract should be canceled for such breach.

ART. 501 (*Records of Employment*).—Every contractor subject to the provisions of the act and these Regulations shall maintain the following records of employment which shall be available for the inspection and transcription of authorized representatives of the Secretary of Labor:

(*a*) Name, address, sex, and occupation of each employee covered by the contract stipulations.

(*b*) Date of birth of each such employee under 21 years of age.

(*c*) Wage and hour records for each such employees including the rate of wages and the amount paid each pay period, the hours worked each day and each week, and the period during which each such employee was engaged on a Government contract with the number of such contract. Compliance with this subsection shall be deemed complete if wage-and-hour records for all employees in the plant are maintained during the period between the award of any Government contract and the date of delivery of the materials, supplies, articles, or equipment: *Provided*, That where no separate records for employees engaged on Government contracts are main-

tained, it shall be presumed until affirmative proof is present to the contrary that all employees in the plant, from the date of award of any such contract until the date of delivery of the materials, supplies, articles or equipment, were engaged on such Government contract.

Such records shall be kept on file for at least 1 year after the termination of the contract.

ART. 601 (*Requests for Exceptions and Exemptions*).—Request for the exception or exemption of a contract or class of contracts from the inclusion or application of one or more of those stipulations required by article 1 must be made by the head of a contracting agency or department and shall be accompanied with a finding by him setting forth reasons why such inclusion or application will seriously impair the conduct of Government business.

Request for the exception or exemption of a stipulation respecting minimum rates of pay and maximum hours of labor contained in an existing contract must be made jointly by the head of the contracting agency and the contractor and shall be accompanied with a joint finding by them setting forth reasons why such exception or exemption is desired.

All requests for exceptions or exemptions shall be transmitted through the Procurement Division of the Treasury for submission to the Department of Labor for consideration and shall be returned through the Procurement Division.

ART. 602 (*Decisions Concerning Exceptions and Exemptions*).—Decisions concerning exceptions and exemptions shall be in writing and approved by the Secretary of Labor or officer prescribed by him, originals being filed in the Department of Labor, and certified copies shall be transmitted to the department or agency originating the request, to the Comptroller General, and to the Procurement Division of the Treasury. All such decisions shall be promulgated to all contracting agencies by the Procurement Division of the Treasury.

ART. 603 (*Administrative Exemptions*).—The following classes of contracts have been exempted from the application of article 1 of these Regulations pursuant to the procedure required under section 6 of the act:

(*a*) Contracts for public utility services including electric light and power, water, steam, and gas;

(*b*) Contracts which are to be performed outside the geographic limits of the United States, its territories, and the District of Columbia, except where such performance requires a shipment from within such geographic limits;

(*c*) Contracts covering purchases against the account of a defaulting contractor where the stipulations required herein were not included in the defaulted contract.

ART. 701 (*Definition of "Person"*).—Whenever used in these Regulations, the word "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trutees, trustees in bankruptcy, or receivers.

ART. 1101 (*Minimum Wages*).—Until a determination of the prevailing minimum wage for a particular industry or group of industries has been made by the Secretary of Labor prior to the invitation for bids, the stipulation with respect to wages in section 1 (b) of the act will be inoperative, as provided in article 1 (b) of these Regulations.

Determinations of prevailing minimum wages or changes therein will be published in the Federal Register and sent to contracting officers through circular letters of the Procurement Division of the Treasury. Such determinations will be effective upon the dates fixed therein.

ART. 1201 (*Reports of Contracts Awarded*).—Whenever the contracting officer shall award a contract in which the stipulations required under article 1 are operative, he shall furnish the Department of Labor in duplicate on forms provided for this purpose, a statement showing the name of the contracting agency, the purchase order number, the material purchased, the date of award, the contract price, the proposed date of delivery,

the contractor's name and address, and the name and location of the plant or plants fabricating or supplying the subject matter of the contract.

ART. 1202 (*Complaints*).—Whenever any officer or employee of the United States Government or of any agency thereof has any knowledge of or receives any complaint with respect to a breach or violation of the stipulations required under article 1, he shall transmit such complaint according to the usual practice in his department to the Department of Labor together with such other information as he has in his possession.

ART. 1203 (*Other Contracts*).—Nothing in these Regulations shall be construed as impairing the authority possessed by any contracting agency to require labor standards in contracts not covered by this act.

FRANCES PERKINS,
Secretary of Labor.

WASHINGTON, D. C., *September 14, 1936.*

APPENDIX III

The Bacon-Davis Act, as Amended

Act of March 3, 1931, c. 411, 46 Stat. 1494, as amended August 30, 1935, c. 825, 49 Stat. 1101, U. S. Code, title 40, § 276a and Supp. II, title 40, §§ 276a-276a-6.

An Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors or subcontractors, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

That the advertised specifications for every contract in excess of $2,000, to which the United States or the District of Columbia is a party, for construction, alteration, and/or repair, including painting and decorating, of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account,

the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications, regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics, and that the scale of wages to be paid shall be posted by the contractor in a prominent and easily accessible place at the site of the work; and the further stipulation that there may be withheld from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

Sec. 2. Every contract within the scope of this Act shall contain the further provision that in the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and to prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

Sec. 3. (a) The Comptroller General of the United States is hereby authorized and directed to pay directly to laborers and mechanics from any accrued payments withheld under the terms of the contract any wages found to be due laborers and mechanics pursuant to this Act; and the Comptroller General of the United States is

further authorized and is directed to distribute a list to all departments of the Government giving the names of persons or firms whom he has found to have disregarded their obligations to employees and subcontractors. No contract shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have an interest until three years have elapsed from the date of publication of the list containing the names of such persons or firms.

(b) If the accrued payments withheld under the terms of the contract, as aforesaid, are insufficient to reimburse all the laborers and mechanics with respect to whom there has been a failure to pay the wages required pursuant to this Act, such laborers and mechanics shall have the right of action and/or of intervention against the contractor and his sureties conferred by law upon persons furnishing labor or materials, and in such proceedings it shall be no defense that such laborers and mechanics accepted or agreed to accept less than the required rate of wages or voluntarily made refunds.

Sec. 4. This Act shall not be construed to supersede or impair any authority otherwise granted by Federal law to provide for the establishment of specific wage rates.

Sec. 5. This Act shall take effect thirty days after its passage, but shall not affect any contract then existing or any contract that may thereafter be entered into pursuant to invitations for bids that are outstanding at the time of the passage of this Act.

Sec. 6. In the event of a national emergency the President is authorized to suspend the provisions of this Act.

Sec. 7. The funds appropriated and made available by the Emergency Relief Appropriation Act of 1935 (Public Resolution Numbered 11, Seventy-fourth Congress), are hereby made available for the fiscal year ending June 30, 1936, to the Department of Labor for expenses of the administration of this Act.

APPENDIX IV

The Walsh Bill

S. 3055 (74th Congress, First Session) as passed by the Senate on August 12, 1935, and referred on August 23, 1935, to the Committee on the Judiciary of the House of Representatives:

AN ACT

To provide conditions for the purchase of supplies and the making of contracts, loans, or grants by the United States and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in connection with all or any purchases of or contracts for construction, articles, materials, supplies, equipment, or services, except professional services, made, extended, or modified on or after the effective date hereof, by any executive department, independent establishment, or other agency or instrumentality of the United States, by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as "agencies of the United States"), there shall be required to be included in the proposal or contract a representation or agreement that all persons employed by the principal contractor in classes of employment described specifically or by reference in the invitation to bid, while engaged in the construction, or the production or furnishing of articles, materials, supplies, equipment, or services, in connection with, or which may be identified as part of the subject matter of, the purchase or contract have since the effective date of this Act been paid not less than such minimum rates of pay and employed not to exceed such maximum hours as on May 26, 1935, were specified in the codes of fair competition and amendments thereto (subject, however, to any stays, exemptions, or exceptions

theretofore issued or granted and then operative under Executive, administrative, or other applicable orders, rules, or regulations) approved pursuant to section 3 (a) and/or section 2 (b) of Title I of the National Industrial Recovery Act approved June 16, 1933, purporting to apply to their respective trades or industries, or as were specified in the President's Reemployment Agreement or approved substitutions therefor, if any, where there were on May 26, 1935, no approved codes of fair competition for such trades or industries, and further that they will be paid not less than such minimum rates of pay and employed not to exceed such maximum hours as shall be designated specifically or by reference in the invitation to bid, and that no person under sixteen years of age and no convict labor has been on or after the effective date hereof or will be employed by the principal contractor in the construction, or the production or furnishing of articles, materials, supplies, equipment, or services, in connection with, or which may be identified as part of the subject matter of, the purchase or contract.

SEC. 1-A. There shall also be included in every contract entered into pursuant to section 1 a covenant that the principal contractor will obtain from every subcontractor or supplier of such articles, materials, supplies, equipment, or services as may be identified as part of the subject matter of the principal contract, a written representation or agreement that all persons employed by such subcontractor or supplier in classes of employment described specifically or by reference in the invitation to bid issued by the agency of the United States, while engaged in carrying out the subcontract, or in the production or furnishing of articles, materials, supplies, equipment, or services, in connection with, or which may be identified as part of the subject matter of, the purchase or contract, have since the effective date of this Act been paid not less than such minimum rates of pay and employed not to exceed such maximum hours as on May 26, 1935, were specified in the codes of fair competition and amendments

thereto (subject, however, to any stays, exemptions, or exceptions theretofore issued or granted and then operative under Executive, administrative, or other applicable orders, rules, or regulations), approved pursuant to section 3 (a) and/or section 2 (b) of Title I of the National Industrial Recovery Act approved June 16, 1933, purporting to apply to their respective trades or industries, or as were specified in the President's Reemployment Agreement or approved substitutions therefor, if any, where there were on May 26, 1935, no approved codes of fair competition for such trades or industries, and that they will be paid not less than such minimum rates of pay and employed not to exceed such maximum hours of labor as shall be described specifically or by reference in such invitations to bid, and that no person under sixteen years of age and no convict labor has been or after the effective date hereof will be employed by such subcontractor or supplier in the carrying out of the subcontract or in the production or furnishing of articles, materials, supplies, equipment, or services in connection with, or which may be identified as part of the subject matter of, the principal contract.

SEC. 2. In all or any contracts or agreements made, extended, or modified hereafter by agencies of the United States for a loan (including Federal Reserve bank industrial loans) or grant of funds or labor to any private person or corporation, there shall be included a representation or agreement that his or its employees engaged in the operations involving the expenditure of funds so loaned or granted or the use of such labor have since the effective date of this Act been paid not less than such minimum rates of pay and employed not to exceed such maximum hours as on May 26, 1935, were specified in the codes of fair competition and amendments thereto (subject, however, to any stays, exemptions, or exceptions theretofore issued or granted and then operative under Executive, administrative, or other applicable orders, rules, or regulations), approved pursuant to section 3 (a)

and/or section 2 (b) of Title I of the National Industrial Recovery Act approved June 16, 1933, purporting to apply to their respective trades or industries, or as were specified in the President's Reemployment Agreement or approved substitutions therefor, if any, where there were on May 26, 1935, no approved codes of fair competition for such trades or industries and that during the expenditure of the funds so loaned or granted or during the utilization of such labor they will be paid not less than the minimum rates of pay and employed not more than the maximum hours of labor as shall be specified in such contract for loan or grant and that no person under sixteen years of age and no convict labor has been on or after the effective date hereof or will be employed in the carrying out of such operations or in the production or furnishing of articles, materials, supplies, equipment, or services in connection therewith; and a further covenant that the borrower or grantee will require a similar written representation or agreement from those with whom it contracts or from whom it makes purchases of articles, materials, supplies, equipment, or services in connection with the carrying out of projects or operations financed wholly or in part with the funds so loaned or granted or in connection with which such labor is used: *Provided*, That this section shall not apply to loans to financial institutions where the funds are commingled with the funds of the borrower and used for general business purposes.

SEC. 2-A. In all or any contracts or agreements made, extended, or modified hereafter, by agencies of the United States for the loan or grant of funds or labor to any State, Territory, possession, including subdivisions and agencies thereof, municipality, and the District of Columbia, there shall be included a representation or agreement by the borrower or grantee, that it will require a representation or agreement from those with whom it contracts or from whom it makes purchases of articles, materials, supplies, equipment, or services in connection with the

projects or operations financed or carried out wholly or in part with funds or labor so loaned or granted to it, that all persons employed by them in classes of employment described specifically or by reference in the contract or agreement for the loan or grant by the United States or any agency thereof, while engaged in the carrying out of the projects or operations, or in the production or furnishing of articles, materials, supplies, equipment, or services which shall be used in connection therewith, have since the effective date of this Act been paid not less than such minimum rates of pay and employed not to exceed such maximum hours as on May 26, 1935, were specified in the codes of fair competition and amendments thereto (subject, however, to any stays, exemptions, or exceptions thereto issued or granted and then operative under Executive, administrative, or other applicable orders, rules, or regulations), approved pursuant to section 3 (a) and/or section 2 (b) of Title I of the National Industrial Recovery Act approved June 16, 1933, purporting to apply to their respective trades or industries, or as were specified in the President's Reemployment Agreement or approved substitutions therefor, if any, where there were on May 26, 1935, no approved codes of fair competition for such trades or industries, and will be paid not less than such minimum rates of pay and employed not to exceed such maximum hours of labor as shall be designated specifically or by reference in such contract or agreement for loan or grant, and that no person under sixteen years of age and no convict labor has been on or after the effective date hereof or will be employed by them in the carrying out of such projects or operations or in the production of articles, materials, or supplies or the furnishing of services in connection therewith: *Provided, however,* That where any borrower or grantee of funds or labor directly carries out the projects or operations wholly or in part with the funds or labor so loaned or grant to it, then, and in that event, all persons in classes of employment described specifically or by reference in the contract or agreement for the loan or grant,

especially employed by the borrower or grantee to carry out such projects or operations, shall be paid not less than such minimum rates of pay and employed not to exceed such maximum hours of labor as shall be designated specifically or by reference in such contract or agreement for loan or grant, and no person under sixteen years of age and no convict labor shall be employed in the carrying out of such projects or operations.

SEC. 2-B. There shall also be included in every contract or agreement for loan or grant entered into pursuant to sections 2 and 2-A a covenant that the principal contractor of the borrower or grantee will be required to obtain from every subcontractor or supplier of articles, materials, supplies, equipment, or services which may be identified as part of the subject matter of the principal contract, a written representation or agreement that all persons employed by such subcontractor or supplier in classes of employment described specifically or by reference in the contract or agreement for loan or grant while engaged in carrying out the subcontracts, or in the production or furnishing of articles, materials, supplies, equipment, or services in connection with, or which may be identified as part of the subject matter of, the principal contract, have since the effective date of this Act been paid not less than such minimum rates of pay and employed not to exceed such maximum hours as on May 26, 1935, were specified in the codes of fair competition and amendments thereto (subject, however, to any stays, exemptions, or exceptions, theretofore issued or granted and then operative under Executive, administrative, or other applicable orders, rules, or regulations), approved pursuant to section 3 (a) and/or section 2 (b) of Title I of the National Industrial Recovery Act approved June 16, 1933, purporting to apply to their respective trades or industries, or as were specified in the President's Reemployment Agreement or approved substitutions therefor, if any, where there were on May 26, 1935, no approved codes of fair competition for such trades or industries,

and will be paid not less than such minimum rates of pay and employed not to exceed such maximum hours of labor as shall be designated specifically or by reference in such contract or agreement for loan or grant, and that no person under sixteen years of age and no convict labor has been on or after the effective date hereof or will be employed by such subcontractor or supplier in carrying out the subcontract or in the production or furnishing of articles, materials, supplies, equipment, or services as may be identified as part of the subject matter of the principal contract.

SEC. 3. Every representation or agreement made pursuant to the provisions of this Act by a principal contractor, borrower, grantee, subcontractor, or supplier, shall provide:

(1) That any breach or violation thereof shall render the party responsible therefor liable to the United States as and for liquidated damages in—

(a) a sum equal to twice the difference between the amount required to be paid to employees, including the amount required to be paid for overtime in excess of the maximum hours designated in the invitation for bids, and the amount actually paid;

(b) the sum of $10 per day with respect to each person under sixteen years of age employed in violation of any representation or agreement.

(2) That the exaction or acceptance of any refunds ("kick-backs") of wages in any form whatsoever, from employees shall render the party exacting or accepting same liable to the United States as and for liquidated damages in a sum equal to five times the amount of such refund: *Provided*, That allowance shall be made for any penalty imposed on account of the same act or transaction and collected under any other Act of Congress;

(3) That any breach or violation thereof shall entitle the other contracting party to cancel the contract with respect to which the representation or agreement is made,

and to make open-market purchases or have the work completed, charging any additional cost to the party responsible for the breach or violation;

(4) That the principal contractor shall, if directed by the contracting officer upon the recommendation of the President, cancel any subcontract for a breach by the subcontractor of his written representation or agreement, and failure on the part of the principal contractor so to cancel shall subject his contract to cancelation;

(5) That the representatives of any agency charged with the administration of this Act may enter upon the premises of any borrower, grantee, contractor, subcontractor, or supplier for the purpose of obtaining information necessary for the administration of the provisions of this Act and that the borrower, grantee, contractor, subcontractor, or supplier will furnish upon request, duly authenticated or certified copies of his pay roll and such other relevant records as may be requested by any duly authorized representative of any agency charged with administration of this Act.

Sec. 4. Any sums due to the United States by virtue of the foregoing section if not withheld from any amounts due upon any contracts may be recovered in suits brought in the name of the United States by the Attorney General. Sums withheld or recovered shall be held in a special deposit account, and shall be applied, on order of the President to payment of deficiency in wages to employees who have been paid less than the minimum rates of pay and on account of whose services such sums were withheld or recovered: *Provided*, That no claims by employees for such payments shall be entertained unless made within one year from the date of the notification to the supplier or contractor of the withholding or recovery by the United States of such sums: *Provided, however*, That nothing herein contained shall authorize or permit any such claims to be prosecuted against the United States or any agency thereof, at law or otherwise, to obtain or recover any funds which are collected, collectible,

deducted, or deductible under the provisions of this Act.

Sec. 5. Upon his own motion, or on complaint of a breach or violation of a representation, agreement, or covenant made as herein provided, the President shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, failure, or refusal by any person to obey such an order, any District Court of the United States or of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the President, shall have jurisdiction to issue to such person an order requiring such person to appear before the President, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and the President shall have the power to make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the evidence, shall be conclusive upon review by the courts, and the President shall have the power, and is hereby authorized, to make such decisions based upon findings of fact as are deemed to be necessary to enforce the provisions of this Act.

Sec. 6. The President may make exceptions in specific cases or otherwise under the provisions of this Act whenever such action shall be recommended by an agency of the United States and when justice or public interest will be served thereby and upon the joint recommendation of the governmental agency and the contractor, may modify the terms of an existing contract respecting minimum

rates of pay and maximum hours of labor as may be found necessary and proper in the public interest or to prevent injustice or undue hardship and the President may provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act on the extent of the application of this Act to contractors, subcontractors, suppliers, borrowers, or grantees as hereinbefore described.

Sec. 7. Any bid or proposal received by an agency of the United States may be rejected when it has been previously determined pursuant to the provisions of this Act, that the person submitting the same has previously breached any of the covenants required by this Act and that the acceptance of such bid or proposal would not be in the public interest.

Sec. 8. The specific minimum wages and maximum hours specified or referred to in any invitation to bid or contract or agreement for loan or grant shall be determined by the President: *Provided, however,* That minimum wages and maximum hours fixed under this Act shall be such as are fair and reasonable taking into account the following primary standards:

(a) The cost of living;

(b) The standards for the same class of labor in the same trade or industry in the same locality;

(c) The standards in effect for such class of labor during the year 1934; and

(d) The minimum rates of pay and maximum hours of labor specified in the applicable codes of fair competition and approved amendments thereto, if any, approved pursuant to section 3(a) and/or section 2(b) of Title I of the National Industrial Recovery Act approved June 16, 1933, purporting to apply to the respective trades or industries, or where there were on May 26, 1935, no approved codes of fair competition for such trades or industries, then those minimum rates of pay and maxi-

mum hours specified in the President's Reemployment Agreement or approved substitutions therefor, if any: *Provided further*, That the President shall set a rate for any overtime in excess of the maximum hours designated in the specification or invitation to bid.

Sec. 9. (a) This Act shall take effect thirty days after its approval: *Provided, however*, That—

(b) Where permitted by the terms of such contracts, this Act shall be applicable to contracts entered into prior to its effective date: *Provided*, That in such cases the requirements as to the minimum rates of pay, maximum hours of labor, and minimum age of employees shall be those prescribed therefor in accordance with the foregoing provisions of this Act, whether such requirements are prescribed before or after such contract was entered into: *Provided further*, That such contracts shall be subject to modification as to compensation upon proof by the contractor of excess cost occasioned solely by compliance with such requirements.

(c) Where proposals have been invited prior to the effective date of this Act and bids are submitted thereon containing no provisions with respect to requirements as to minimum rates of pay, maximum hours of labor, or minimum age of employees, contracts may be executed according to such proposals.

(d) Where proposals have been invited prior to the effective date of this Act, no bid submitted in response thereto if otherwise valid and acceptable, shall be rejected because made subject to the provisions of any code or codes of fair competition or the President's Reemployment Agreement or applicable approved substitutions therefor, if any, or any related requirements prescribed by Executive Order Numbered 6246 of August 10, 1933, as modified by Executive Order Numbered 6646 of March 14, 1934, if the bidder, with the assent of his surety, shall agree in writing that the contract, if entered into, shall, in lieu of said code provisions or other related requirements prescribed by said Executive orders, be sub-

ject to the provisions of this Act in the same manner and to the same extent as contracts made subject thereto by the provisions of this Act: *Provided*, That in such cases the compensation to be provided for in the contract shall be reduced or increased from that stated in such bid in the amount and to the extent that the contracting officer shall find the cost of performing the contract will be reduced or increased solely by reason of compliance by the contractor, subcontractor, or supplier with the requirements of such substituted provisions.

(e) Where proposals have been invited prior to the effective date of this Act and all bids submitted in response thereto have been rejected for the sole reason that same were made subject to the provisions of any code or codes of fair competition and amendments thereto, if any, or the President's Reemployment Agreement or applicable approved substitutions therefor, if any, or any related requirements prescribed by Executive Order Numbered 6246 of August 10, 1933, as modified by Executive Order Numbered 6646 of March 14, 1934, and no invitation for further bids has been issued, if the bidder, whose bid would otherwise have been accepted, with the assent of his surety, shall agree in writing that the contract, if entered into, shall be subject to the provisions of this Act in the same manner and to the same extent as contracts made subject thereto by the provisions of this Act, contracts may, in the discretion of the officer or officers otherwise authorized to accept the bid, be executed according to such proposals: *Provided*, That in such cases the compensation to be provided for in the contract shall be reduced or increased from that stated in such bid in the amount and to the extent that the contracting officer shall find the cost of performing the contract will be reduced or increased solely by reason of compliance by the contractor with the requirements of such substituted provisions.

Sec. 10. The provisions of this Act shall be carried out under the direction of the President and in accordance

with such orders, rules, and regulations as he may issue for that purpose. The President is hereby authorized to establish such agency or agencies and to appoint, subject to the provisions of the civil-service laws, such officers and employees, and without regard to the civil-service laws semijudicial and administrative officers, attorneys, and examiners, and to utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees as he may find necessary; to prescribe their authorities, duties, responsibilities, and tenure; and, in accordance with provisions of the Classification Act of 1923, as amended, to fix the compensation of any officers and employees so appointed. The President may authorize any of his functions under this Act to be performed by any agency or agencies now existing or hereafter established within the Government. The President, or any member of any Board, or any individual upon whom is delegated under section 11 the authority to administer this section of this Act, and any examiner duly authorized by such Board or individual is authorized to administer oaths to such witnesses. The funds appropriated and made available pursuant to section 220 of the National Industrial Recovery Act by the Fourth Deficiency Act, fiscal year 1933, and by the Emergency Relief Appropriation Act of 1935, are hereby made available for the expenses of administration of this Act.

Sec. 11. The provisions of this Act shall not be construed to modify or amend title III of the Act entitled "An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes", approved May 3, 1933 (commonly known as the "Buy American Act"), nor shall the provisions of this Act be construed as authorizing the payment of wages below the standards required by "An Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes", approved March

3, 1931 (commonly known as the "Bacon-Davis Act"), as amended from time to time, with respect to contracts which are also within the provisions of such Act as amended from time to time, nor the wage and hour provisions of title II of the National Industrial Recovery Act approved June 16, 1933, as extended.

Sec. 12. Nothing in this Act shall be construed to apply to agricultural or farm products processed for first sale by the original producer nor to loans made by any governmental agency to associations of producers as defined in the Farm Credit Act of 1935 nor to any contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof. Nothing in this Act shall be construed to apply to loans made by the Governor of the Farm Credit Administration, or by any agency, corporation, or institution under the supervision or control of the Farm Credit Administration.

SEPARABILITY CLAUSE

Sec. 13. If any provision of this Act, or the application thereof to any persons or circumstances, is held invalid, the remainder of the Act, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

Sec. 14. This Act shall remain in force for two years after the date it becomes effective.

Passed the Senate July 29 (calendar day, August 12), 1935.

Attest: EDWIN A. HALSEY,
Secretary.

APPENDIX V

The Healey Bill

H. R. 11554 (74th Congress, Second Session) as introduced in the House on March 2, 1936, and referred to the Committee on the Judiciary of the House:

A BILL, To provide conditions for the purchase of supplies and the making of contracts by the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in any purchases of or contracts for construction, articles, materials, supplies, equipment, or services, except professional services, in an amount exceeding $2,000 by any executive department, independent establishment, or other agency or instrumentality of the United States, by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being heinafter designated as agencies of the United States), there shall be required to be included in the proposal or contract a representation or agreement that all persons hereafter employed by the principal contractor in classes of employment described specifically or by reference in the invitation to bid, while engaged in the construction, or the production or furnishing of articles, materials, supplies, equipment or services, in connection with, or which may be identified as part of the subject matter of, the purchase or contract will be paid not less than such minimum rates of pay and employed not to exceed such maximum hours as shall be designated specifically or by reference in the invitation to bid, and that no person under sixteen years of age and no convict labor will be employed by the principal contractor in the construction, or the production or furnishing of articles, materials, supplies, equipment, or services, in connection with, or which may be identified as part of the subject matter of, the purchase or contract.

SEC. 2. Every purchase or subcontract by the principal contractor or by the person engaged in the performance or the productive operations under the principal contract for construction, articles, materials, supplies, equipment, or services (except professional services) with respect to the subject matter of the principal purchase or contract shall be deemed to contain the representations or agreements incorporated therein, and any breach or violation thereof shall be deemed a breach or violation by the employer directly responsible therefor, and shall not subject the principal contractor to any of the provisions of section 3 (1) or section 3 (2), provided he has given actual notice of such representations or agreements to such employer.

SEC. 3. Every representation or agreement made pursuant to the provisions of this Act by a principal contractor, subcontractor, or supplier, shall provide:

(1) That any breach or violation thereof shall render the party responsible therefor liable to the United States as and for liquidated damages in—

(a) a sum equal to twice the difference between the amount required to be paid to employees, including the amount required to be paid for overtime in excess of the maximum hours designated in the invitation for bids, and the amount actually paid;

(b) the sum of $10 per day with respect to each person under sixteen years of age employed in violation of any representation or agreement.

(2) That the exaction or acceptance of any refunds or kick-backs of wages, in any form whatsoever, from employees shall render the party exacting or accepting same liable to the United States as and for liquidated damages in a sum equal to five times the amount of such refund: *Provided*, That allowance shall be made for any penalty imposed on account of the same act or transaction and collected under any other Act of Congress;

(3) That any breach or violation thereof shall entitle the other contracting party to cancel the contract with re-

spect to which the representation or agreement is made, and to make open-market purchases or have the work completed, charging any additional cost to the party responsible for the breach of violation;

(4) That the principal contractor shall, if directed by the contracting officer upon the recommendation of the Secretary of Labor, cancel any subcontract for a breach by the subcontractor of his representation or agreement, and failure on the part of the principal contractor so to cancel shall subject his contract to cancelation.

SEC. 4. Any sums due to the United States by virtue of the foregoing section may be withheld from any amounts due upon any contracts or may be recovered in suits brought in the name of the United States by the Attorney General. Sums withheld or recovered shall be held in a special deposit account, and shall be applied, on order of the Secretary of Labor, to payment of deficiency in wages to employees who have been paid less than the minimum rates of pay and on account of whose services such sums were withheld or recovered: *Provided*, That no claims by employees for such payments shall be entertained unless made within one year from the date of the notification to the supplier or contractor of the withholding or recovery by the United States of such sums.

SEC. 5. Any bid or proposal received by an agency of the United States may be rejected when it has been determined, pursuant to the provisions of this Act, that the person submitting the same has in the performance of any other contract breached any of the agreements or representations required by this Act.

SEC. 6. The Secretary of Labor is hereby authorized to create in the Department of Labor a unit for administering the provisions of this Act, and without regard to the civil-service laws, but in accordance with the Classification Act of 1923, as amended, to appoint and to fix the compensation of such officers, attorneys, examiners, and to appoint such other employees with regard to existing

laws applicable to the employment and compensation of employees of the United States and to utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees as he may find necessary to discharge the duties of said unit, and to prescribe rules and regulations with respect to their duties.

SEC. 7. Upon his own motion, or on complaint of a breach or violation of a representation, agreement, or covenant made as herein provided, the Secretary of Labor or representative designated by him shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, failure, or refusal by any person to obey such an order, any District Court of the United States or of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before the Secretary or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and the Secretary shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the evidence, shall be conclusive upon review by the courts; and the Secretary shall have the power, and is hereby authorized, to make such decisions based upon findings of fact as are deemed to be necessary to enforce the provisions of this Act.

SEC. 8. The Secretary of Labor may make exceptions

respecting minimum rates of pay and maximum hours of labor in specific cases or otherwise under the provisions of this Act whenever such action shall be recommended by an agency of the United States and when justice or public interest will be served thereby. Upon the joint recommendation of the governmental agency and the contractor, the Secretary may modify the terms of an existing contract respecting minimum rates of pay and maximum hours of labor as may be found necessary and proper in the public interest or to prevent injustice or undue hardship. The Secretary may provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act respecting minimum rates of pay and maximum hours of labor or the extent of the application of this Act to contractors, subcontractors, or suppliers, as hereinbefore described.

SEC. 9. The specific minimum wages and maximum hours specified or referred to in any proposal or contract shall be determined by the Secretary of Labor: *Provided, however*, That minimum wages fixed under this Act shall be such wages as are fairly and reasonably commensurate with the value of the service or class of service rendered. In establishing a minimum wage for any service or class of service under this Act the Secretary without being bound by any technical rules of evidence or procedure (1) may take into account all relevant circumstances affecting the value of the service or class of service rendered, (2) may be guided by like considerations as would guide a court in a suit for the reasonable value for services rendered where services are rendered at the request of an employer without contract at to the amount of the wage to be paid, and (3) may consider the wages paid for work of like or comparable character by employers who voluntarily maintain minimum fair-wage standards; and in establishing maximum hours may take into account (1) the prevailing weekly total of hours for such class of services in the year 1934, (2) the health and safety of

employees, (3) the amount of unemployment in the particular industries, (4) the effect of excessive hours of labor upon the quality of goods and services furnished the United States: Provided further, That the Secretary shall set a rate for any overtime in excess of the maximum hours designated in the specification or invitation to bid. Such rate shall be not less than one and one-half times the basic hourly rate received by the employee affected.

SEC. 10. Funds appropriated and made available by the Emergency Relief Appropriation Act of 1935 (Public Resolution Numbered 11) are hereby made available for the fiscal year ending June 30, 1937, to the Department of Labor for expenses of the administration of this Act.

SEC. 11. When used in this Act, the term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

SEC. 12. The provisions of this Act shall not be construed to modify or amend title III of the Act entitled "An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes", approved May 3, 1933 (commonly known as the Buy American Act), nor shall the provisions of this Act be construed as authorizing the payment of wages below the standards required by "An Act relating to the rate of wages for laborers and mechanics employed on public buildings of the United States and the District of Columbia by contractors and subcontractors, and for other purposes", approved March 3, 1931 (commonly known as the Bacon-Davis Act), as amended from time to time, with respect to contracts which are also within the provisions of such Act as amended from time to time, nor the wage and hour provisions of title II of the National Industrial Recovery Act approved June 16, 1933, as extended.

SEC. 13. Nothing in this Act shall be construed to

apply to agricultural or farm products processed for first sale by the original producer nor to any contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof. Nothing in this Act shall be construed to apply to common carriers subject to the Interstate Commerce Act and to the Railway Labor Act.

SEPARABILITY CLAUSE

SEC. 14. If any provision of this Act, or the application thereof to any persons or circumstances, is held invalid, the remainder of the Act, and the application of such provisions to other persons or circumstances, shall not be affected thereby.

SEC. 15. This Act shall apply to all contracts entered into pursuant to invitations for bids issued on or after thirty days from the effective date of this Act.

APPENDIX VI

There are set forth in this Appendix VI excerpts from Acts of Congress, other than the Public Contracts Act, employing the term "locality" to denote the area within which prevailing wages are to be determined, and which term as so employed is conceded by petitioners (Br., p. 95) to mean "a small geographical area". For ease of reference, the phrase in which such term occurs in each of the following excerpts is italicized.

Emergency Relief Appropriation Act of 1937 (50 Stat. 352, 354):

That * * * there is hereby appropriated * * * $1,500,000,000 * * * : Provided, That this appropriation shall be available for the following classes of public projects, * * * (a) assistance for educational, professional and self-help, and clerical persons and women's projects, * * *.

* * * * * *

Sec. 2. In carrying out the purposes of the foregoing appropriation the President is authorized (a) to prescribe such rules and regulations as may be necessary and to utilize agencies within the Government and to empower such agencies to prescribe rules and regulations to carry out the functions delegated thereto by the President: Provided, That the rates of pay for persons engaged upon projects under the foregoing appropriation shall be not less than the *prevailing rates of pay for work of a similar nature in the same locality* as determined by the Works Progress Administration with the approval of the President; * * *.

Emergency Relief Appropriation Act of 1938 (52 Stat. 809, 812):

Section 1. That * * * there is hereby appropriated * * * :

(1) To the Works Progress Administration, $1,425,-

000,000, together with the balances of allocations heretofore made or hereafter to be made * * *, and such amounts shall be available for * * * (d) the following types of public projects, * * *. (3) educational, professional, clerical, cultural, recreational, production, service, including training for domestic service, and miscellaneous non-construction projects * * *.

* * * * * *

Sec. 9. The rates of pay for persons engaged upon projects under the appropriations in this title shall be not less than the *prevailing rates of pay for work of a similar nature in the same locality* as determined by the Works Progress Administration: Provided, That if minimum rates of pay for persons employed by private employers in any occupation are established by or pursuant to the authority conferred by any Labor Standards Act enacted at the third session of the Seventy-fifth Congress, not less than the minimum rates of pay so established shall be paid to persons in similar occupations in the same locality employed on projects under the appropriation in subsection one of section one of this title.

Act of September 1, 1937 (50 Stat. 888, 897), creating the United States Housing Authority:

* * * * * *

Sec. 16. In order to protect labor standards—

(1) The provisions of the Act of August 30, 1935, entitled "An Act to amend the Act approved March 3, 1931, relating to the rate of wages for laborers and mechanics employed by contractors and sub-contractors on public buildings" (49 Stat. 1011), and of the Act of August 24, 1935, entitled "An Act requiring contracts for the construction, alteration, and repair of any public building or public work of the United States to be accompanied by a performance bond protecting the United States and by an additional bond for the protection of persons furnishing

material and labor for the construction, alteration, or repair of said public buildings or public work" (U. S. C., 1934 edition, Supp. II, title 40, secs. 270a to 270d, inclusive), shall apply to contracts in connection with the development or administration of Federal projects and the furnishing of materials and labor for such projects: *Provided*, That suits shall be brought in the name of the Authority and that the Authority shall itself perform the duties prescribed by section 3 (a) of the Act of August 30, 1935, and section 3 of the Act of August 24, 1935.

(2) Any contract for loans, annual contributions, capital grants, sale, or lease pursuant to this Act shall contain a provision requiring that the *wages or fees prevailing in the locality*, as determined or adopted (subsequent to a determination under applicable State or local law) by the Authority, shall be paid to all architects, technical engineers, draftsmen, technicians, laborers, and mechanics employed in the development or administration of the low-rent housing or slum-clearance project involved; and the Authority may require certification as to compliance with the provisions of this paragraph prior to making any payment under such contract.

Section 212 (a) of the National Housing Act, as added to said Act by Section 14 of the Act of June 3, 1939 (53 Stat. 807):

Sec. 212. (a) The Administrator shall not insure under section 207 or section 210 of this title, pursuant to any application for insurance filed subsequent to the effective date of this section, a mortgage which covers property on which there is or is to be located a dwelling or dwellings, or a housing project, the construction of which was or is to be commenced subsequent to such date, unless the principal contractor files a certificate or certificates (at such times, in course of construction or otherwise, as the Administrator may prescribe) certifying that the laborers and mechanics employed in the construction of the dwelling or dwellings or the housing project involved have

been paid not less than the *wages prevailing in the locality in which the work was performed* for the corresponding classes of laborers and mechanics employed on construction of a similar character, as determined by the Secretary af Labor prior to the beginning of construction and after the date of the filing of the application for insurance.

APPENDIX VII

WEBSTER'S NEW INTERNATIONAL DICTIONARY

(Second Ed., Unabridged, 1939)

locality • • •

1. Fact or state of being local.
2. Limitation to a district or place; as, *locality* of trial.
3. Position; situation; a place; a spot; esp., a geographical place or situation, as of a mineral or plant.
4. *Pl.* Local features or peculiarities. *Rare.*
5. Space or place reference; localization in space; as, the sense of *locality*.
6. *Phrenol.* • • •
7. *Scots Law.* • • •

Syn.—See HABITAT.

habitat, *n.*

1. *Biol.* The natural abode of a plant or animal, esp. the particular location where it normally grows or lives, as the desert, seacoast, etc.
2. Place where anything is commonly found.

Syn.—HABITAT, RANGE, LOCALITY, STATION. In *Biol.*, *habitat* refers especially to the kind of environment in which a plant or animal is normally found, as opp. to *range*, which denotes the geographical region throughout which it is distributed. *Locality* indicates a circumscribed area of its occurrence within the range; and *station*, in its usual restricted sense, refers to the exact spot at which a given specimen or species is found.

local, *adj*:

1. Characterized by, or relating to, place, or position

in space; having a definite spatial form; as a *local* body or presence; a *local* heaven and hell.

2. Characterized by, relating to, or occupying, a particular place or places; characteristic of, or confined to, a particular place or places, not general or widespread; as *local* politics, celebrities; a *local* government.
3. Hence, relating to what is local; not broad or general; as, a person of *local* ideas; a *local* point of view.

UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE (1932)

locality, *n.* local (I.) & -ity.

1. Position or place in which a thing exists.
2. Place, district, neighborhood. Phr. * * *.

FUNK & WAGNALLS NEW STANDARD DICTIONARY OF THE ENGLISH LANGUAGE (1937)

locality

1. A definite spot or region in any part or space; point; site; neighborhood; especially, a geographical position.
2. Restriction to a particular place or district; locale.
3. The state of having a location; the condition of being assigned or belonging to a particular place.

MacMILLAN'S MODERN DICTIONARY (1938)

local, *adj.*

of or belonging to a particular place; confined to a particular locality; not broad or widespread; *n.* train that provides service for a particular district; accommodation train, as distinguished from a *through* train; item of news of only local interest.

locale, *n.* particular place, esp. with reference to some characteristic feature or peculiarity. **local-ism**, *n.*, state of being local; attachment to a place; form of speech or custom peculiar to a district; **local-ist**, *n.* **local-istic**, *adj.* **locality**, *n.* particular place or district; geographical position. **local-ization**, *n.* **local-ize**, **-izing**, *v. t.* fix in or connect with a particular place; restrict to a certain locality; make local in character. * * *.

NEW CENTURY DICTIONARY (1929)

locality * * *

The state or fact of being local, or having place, or being in a place; also, the place in which a thing is or occurs, esp. the geographical place or situation (as, the *locality* of a mineral; the *locality* of a crime); a place, spot, or district, with or without reference to things or persons in it (as, "Feeling unsafe * * * in this *locality*, their colonels had led them into the new town', motley's "Duth Republic," v. 3); in phren., * * *.

local * * *

Pertaining to or characterized by place, or position in space (as, *local* situation; "The poet's pen * * * gives to airy nothing A *local* habitation and a name," Shakespeare's "Midsummer Night's Dream" v. i. 17); also, pertaining to, characteristic of, or restricted to a particular place or particular places (as *local* names; a *local* custom; "The whole neighborhood abounds with *local* tales, haunted spots, and twilight superstitions," Irving's "Sketch-Book," "Sleepy Hollow); also, pertaining to a town or a small district as distinguished from the entire state or country (as, *local* government; *local* option: see phrases following); also, pertaining to or affecting a particular part or particular parts, as of a system or object (as a *local* disease, one which affects a particular part or organ of the body). * * *

MURRAY NEW ENGLISH DICTIONARY (OXFORD)

Locality.

1. The fact or quality of having a place, that is, of having position in space. [Examples of usage omitted.]
2. The fact of being local, in the sense of belonging to a particular spot. Also *pl.* local characteristics, feelings, or prejudices. *Obs.* [Examples of usage omitted.]
3. *pl.* The features or surroundings of a particular place. [Examples of usage omitted.]
4. a. The situation or position of an object; the place in which it is, or is to be found; *esp.* geographical place or situation, e. g. of a plant or mineral. [Examples of usage omitted.]

   b. A place or district, of undefined extent, considered as the site occupied by certain persons or things, or as the scene of certain activities. [Examples of usage omitted.]

AMERICAN ENCYCLOPEDIC DICTIONARY (1894)

locality.

I. *Ordinary language*:

1. Existence in a place, or in a certain portion of space.
2. Limitation to a certain place or locality; as, the *locality* of a trial.
3. Position, situation, place; geographical position or situation.
4. A spot, a place.

II. *Technically*:

1. *Phren.*: * * *
2. *Scots Law*: * * *

local.

A. ***As adjective*:**

1: Of or pertaining to a particular place or spot. [Example of usage omitted.]

2. Limited or confined to one particular place or district.

3. Situated in a particular place; having place or position.

SUPREME COURT OF THE UNITED STATES.

No. 593.—October Term, 1939.

Frances Perkins, Individually and as Secretary of Labor of the United States, et al., Petitioners,
vs.
Lukens Steel Company, Alan Wood Steel Company, South Chester Tube Company, et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[April 29, 1940.]

Mr. Justice Black delivered the opinion of the Court.

In exercise of its authority to determine conditions under which purchases of Government supplies shall be made, Congress passed the Public Contracts Act of June 30, 1936.[1] By virtue of that Act, sellers must agree to pay employees engaged in producing goods so purchased "not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which . . . the supplies . . . are to be manufactured or furnished under said contract." The Court of Appeals for the District of Columbia has held that the Secretary erroneously construed the term "locality" to include a larger geographical area than the Act contemplates, and has ordered six Members of the Cabinet including the Secretary of Labor, the Director of Procurement and all other officials responsible for purchases necessary in the operation of the Federal Government, not to abide by or give effect to the wage determination made by the Secretary for the iron and steel industry either as to the complaining companies or any others. In this vital industry, by action of the Court of Appeals for the District of Columbia, the Act has been suspended and inoperative for more than a year.

We must, therefore, decide whether a Federal court, upon complaint of individual iron and steel manufacturers, may restrain the

[1] 49 Stat. 2036.

Secretary and officials who do the Government's purchasing from carrying out an administrative wage determination by the Secretary, not merely as applied to parties before the Court, but as to all other manufacturers in this entire nation-wide industry. Involving, as it does, the marking of boundaries of permissible judicial inquiry into administrative and executive responsibilities, this problem can best be understood against the background of what took place before the Court of Appeals for the District acted:

July 11, 1938, all the iron and steel companies in the United States were given notice that the Secretary contemplated proceedings for determining the minimum prevailing wage for their industry. On the 25th and 26th of that month, hearings were had before the Public Contracts Board also functioning under the Act. Many companies, and all of those involved here, were represented in the hearings. Companies from the entire United States filed briefs and submitted information and suggestions, and these producers who are parties here had notice of and actively participated in the various stages of the proceedings. After the hearing, time for filing of briefs was allowed. Following investigation of testimony, exhibits, letters, telegrams, briefs, data from the Bureau of Labor Statistics, and arguments of representatives of both labor and industry itself, the Board, October 27, 1938, made its findings of fact, conclusions and recommendations: (a) Accepting recommendations of industry and labor, the Board adopted—with minor exceptions—the definition of the steel industry previously in effect under the National Industrial Recovery Act; (b), "the base rates paid to the workers classified as common laborers" was utilized as a basis for finding the minimum wage prevailing in the industry and a common laborer was defined as "one who performs physical or manual labor of a general character and simple nature, requiring no special training, judgment nor skill"; (c), the view that municipalities be treated as the geographical limit of a "locality" and that different minimum prevailing wage standards be adopted for small as distinguished from larger companies, was rejected. The Board pointed out that "the main channels of trade in the industry take their course far beyond the confines of local producing areas"; that "conventional measurement of miles on the map to outline the marketing areas of the iron and steel producers" was unsuitable; that "geographic location does not limit the efforts of iron and steel manu-

facturers to secure Government business"; that "the workers being paid wages below the base rates are employed in large, medium and small size companies and in plants located in all parts of the country"; and that in fixing a "locality" all these factors as well as geographic and economic considerations were relevant.

The majority of the Board suggested two localities, one for the Southern States and another for the remainder of the steel producing States. One member disagreed and insisted upon four localities throughout the nation, but noted that "the Board is agreed on all the essential facts before it in the case." He recognized that "the law. . . . permits the division of the country into localities for the purpose of determining minimum wages. No rule is laid down to define the extent of any localities . . . . . A too minute concept of locality would obviously nullify the law, for each plant must necessarily occupy a different locale or site from every other. To reduce the interpretation of locality to its most minute point would be to find a minimum wage prevailing in each plant . . . . When we depart from this interpretation we are immediately thrown upon judgment. . . . Obviously we must look for wage patterns or uniformities. . . . Again judgment must be relied upon for the answer." Excepting to the Board's recommendations, the companies now before this Court urged that the Secretary make a finding of minimum prevailing wages with "locality" given the connotation of a subdivision of the respective States as originally provided in the Bacon-Davis Act.[2]

On December 20, 1938, the Assistant Secretary of Labor, acting for the Secretary, heard arguments and received briefs both from industry and labor organizations. He did not adopt the recommendations of the Board in full, but instead divided the industry of the entire country into six "localities", proceeding, however, upon the view that to construe "locality" to mean small political divisions of the States, as the Bacon-Davis Act had done in express terms, would render "effective administration of the Act . . . . almost impossible." It was pointed out that "this narrowly restricted construction of the word 'locality' . . . is contrary to the administrative construction consistently adhered to by the Secretary of Labor in the administration of the Act", and that while Congress had closely followed the language of the Davis-Bacon Act in some

[2] 46 Stat. 1494.

respects, it had "carefully avoided the use of the more narrowly restrictive language of "city, town, village or other civil subdivision." In the twenty-two preceding wage determinations under this Act the Secretary's administrative construction of the term had been—with a sole exception—that of geographic areas no smaller than those determined for the steel industry.[3] The determination in question was made January 16, 1939, but was not made operative until March 1, 1939, "in order that industry may make necessary readjustments to comply with the decision."

In their bill for an injunction and a declaratory judgment, these seven producers of iron and steel (respondents here) sought to enjoin as individuals and in their official capacities, the Secretaries of the Labor, Treasury, War, Navy, and Interior Departments, the Postmaster General, the Director of Procurement of the Treasury Department, the Assistant Secretary of Labor, and the Administrator of the Division of Public Contracts of the Department of Labor and their "officers, agents, assistants, employees, representatives and attorneys, and any one associated with or acting in concert or participation with them, or any of them, and their successors in office and each of them, and their officers," etc. The seven companies named as complainants by the bill did not merely pray relief for themselves against the Secretary's wage determination but insisted that all these Government officials be restrained from requiring the statutory stipulation as to minimum wages in contracts with any other steel and iron manufacturers throughout the United States.

The District Court declined to interfere so sweepingly with the administration of the Act, even in the temporary restraining order which it granted. Its order ran only against the Secretaries of Labor and the Navy, and specifically limited its benefits to but three of the complaining companies. Recitals in the order indicate that only the Secretary of the Navy had actually solicited bids and that only those three companies were "desirous of bidding." After hearing, this order was dissolved and the Court granted a motion to dismiss the complaint for lack of jurisdiction, inadequacy of the complaint, lack of standing to sue, and because the suit was one against the United States without its consent.[4] A stay pending appeal was denied by the

[3] 2 Fed. Reg. 233, 1333, 1335, 1336, 1337, 1338, 1339, 2960, 2976; 3 Fed. Reg. 64, 224, 257, 889, 1613, 895, 901, 1612, 1153, 2371, 2370, 2537, 3043; 4 Fed. Reg. 4005.

[4] The District Court's judgment was rendered without opinion.

District Court, but the Court of Appeals for the District of Columbia, Justice Edgerton dissenting, by temporary injunction granted the sweeping prayer that all the Government officials and agents designated in the bill be restrained from continuing in effect the Determination made by the Secretary of Labor. By motion for reargument, the restrained officials, represented by attorneys of the Government, asked that the injunction be clarified so as to be "restricted to enjoining enforcement of the Determination against parties to this proceeding . . . and . . . not be extended to other bidders, not parties to this action, and who, for all that appears, may desire to abide by the Determination." In the same motion, the Government asked that employees who might be irreparably injured be protected by "a bond or other security to pay the minimum wages if the appellants do not eventually succeed in this case."[5] The record discloses no action by the Court of Appeals on this motion or on a subsequent motion to dissolve the temporary injunction.[6] But the temporary injunction, rendering the Act wholly inoperative as to the iron and steel industry was kept in effect and, reversing the District Court, the Court of Appeals, Jus-

[5] Sections of the Public Contracts Act provides that "breach or violation of any of the representations and stipulations in any contract for the purposes set forth . . . shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, . . . a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; . . . Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in Section 1 hereof may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered; . . . ."

[6] The Government's motion to clarify and restrict the temporary injunction and for security was filed March 29, 1939; the motion to dissolve the temporary injunction was filed April 13, 1939. No specific consideration of these motions by the Court of Appeals for the District of Columbia is disclosed in the record. August 4, 1939, after argument on the merits, that Court of Appeals, per curiam, Justice Edgerton dissenting, announced that the temporary injunction would be kept in effect, that the judgment of the District Court would be reversed and that the grounds for enjoining the administration of the Act would be set out in an opinion "to be filed shortly." The opinion of the Court of Appeals came down October 3, 1939; Justice Edgerton filed a separate opinion in dissent.

tice Edgerton again dissenting, remanded with instructions that relief as prayed in the bill be granted.[7]

In our judgment the action of the Court of Appeals for the District of Columbia goes beyond any controversy that might have existed between the complaining companies and the Government officials. The benefits of its injunction, and of that ordered by it, were not limited to the potential bidders in the "locality", however construed, in which the respondents do business. All Government officials with duties to perform under the Public Contracts Act have been restrained from applying the wage determination of the Secretary to bidders throughout the Nation who were not parties to any proceeding, who were not before the court and who had sought no relief.

As a result of this judicial action, Federal officials had no feasible alternative except to make contracts for imperatively needed supplies for the War and Navy Departments without inclusion of the stipulation which Congress had required. The Public Contracts Act, so far as the steel industry is concerned, has been suspended for more than a year, with no bond or security to protect the public's interest in the maintenance of wage standards contemplated by Congress, should the suspension ultimately appear unwarranted or unauthorized. Here, and below, the Government has challenged the right of the judiciary to take such action, alleging that it constitutes an unwarranted interference with deliberate legislative policy and with executive administration vital to the achievement of governmental ends, at the instance of parties whose rights the Government has not invaded and who have no standing in court to attack the Secretary's determination. The manifestly far-reaching importance of the questions thus raised prompted us to grant certiorari.[8]

Of the six "localities" into which the Secretary's determination divided the steel industry, respondents do business in that consisting of Ohio, Pennsylvania, Delaware, Maryland, Kentucky, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, Maine, the District of Columbia, and a part of West Virginia.[9] Their stated grievance was that the

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[7] 107 F. (2d) 627.

[8] U. S. —.

[9] The remaining five localities are: 1, Louisiana, Arkansas, Mississippi, North Carolina, South Carolina, Florida, Oklahoma, Texas, Alabama, Tennessee, Georgia, Virginia, and a part of West Virginia; 2, Washington, Oregon and

construction given to the term "locality" by the Secretary amounted to "a plain error of law in interpreting the Act, . . . and, consequently, in purporting . . . to determine the prevailing minimum wages for persons employed in the manufacture . . . . of the iron and steel industry in the six so-called 'localities' set forth in this determination [the Secretary] acted arbitrarily and capriciously and wholly without warrant or authority in law." In particular, the complaint alleged—

Respondents had been selling their products to agents of the United States for many years; they wished to continue to bid on Government contracts; their minimum wages had ranged from 53¢ to 56½¢ per hour; if required to pay the 62½¢ per hour minimum rate determined by the Secretary there was grave danger that they would be unable successfully to compete with others for Government contracts; they had a legal right to bid for Government contracts free from any obligation to abide by the minimum wage determination because of alleged illegal administrative construction of "locality"; and if denied the right to bid without paying their employees this minimum wage they would suffer "irreparable and irrecoverable damages" for which the law provided no "plain adequate or complete remedy."

In staying the effect of the administrative wage determination, the Court of Appeals for the District was of the opinion that "the word locality is one of somewhat indefinite meaning" requiring the Secretary to exercise judgment and discretion "within the proper limits of the meaning of locality", but held that the Secretary's determination in this case went "so far beyond any possible proper application of the words as to defeat its meaning and to constitute an attempt arbitrarily to disregard the statutory mandate."

We are of opinion that no legal rights of respondents were shown to have been invaded or threatened in the complaint upon which the injunction of the Court of Appeals was based. It is by now clear that neither damage nor loss of income in consequence of the action of Government, which is not an invasion of recognized legal rights, is in itself a source of legal rights in the absence of consti-

California; 3, Montana, Idaho, Nevada, Wyoming, New Mexico, Utah, Colorado and Arizona; 4, North Dakota, South Dakota, Nebraska, Kansas, Minnesota, Iowa, Missouri and the area in and about East Saint Louis, Illinois; 5, Wisconsin, Illinois (except the area in and about East Saint Louis, Illinois), Michigan and Indiana.

tutional legislation recognizing it as such.[10] It is not enough that the Secretary of Labor is charged with an erroneous interpretation of the term "locality" as an element in her wage determination. Nor can respondents vindicate any general interest which the public may have in the construction of the Act by the Secretary and which must be left to the political process. Respondents, to have standing in court, must show an injury or threat to a particular right of their own, as distinguished from the public's interest in the administration of the law.[11] They claim a standing by asserting that they have particular rights under and even apart from statute to bid and negotiate for Government contracts free from compliance with the determination made by the Secretary of Labor for their industry. Respondents point to Section 3709 of the Revised Statutes and to the Public Contracts Act itself.

Section 3709 of the Revised Statutes requires for the Government's benefit that its contracts be made after public advertising.[12] It was not enacted for the protection of sellers and confers no enforceable rights upon prospective bidders.[13] "The United States needs the protection of publicity, form, regularity of returns and affidavit (Revised Stats., §§ 3709, 3718-3724, 3745-3747), in order to prevent possible frauds upon it by others. A private person needs no such protection against a written undertaking signed by himself. The duty is imposed upon the officers of the Government and not upon him."[14] That duty is owing to the Government and to no one else.

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[10] Tennessee Electric Power Co. *v.* Tennessee Valley Authority, 306 U. S. 118, 137-8; Alabama Power Co. *v.* Ickes, 302 U. S. 464; Massachusetts *v.* Mellon, 262 U. S. 447.

[11] Stearns *v.* Wood, 236 U. S. 75, 78; Fairchild *v.* Hughes, 258 U. S. 126, 129.

[12] R. S. 3709 (41 U. S. C. 5) provides: "Except as otherwise provided by law all purchases and contracts for supplies or services, in any of the departments of the Government, and purchases of Indian supplies, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals."

[13] Cf. Goldberg *v.* Daniels, 231 U. S. 218.

[14] United States *v.* New York and P. R. S. S. Co., 239 U. S. 88, 92, 93; American Smelting and Refining Co. *v.* United States, 259 U. S. 75, 78. Cf. Colorado Paving Co. *v.* Murphy, 78 Fed. 28 (C. C. A. 8th). See 38 Op. Att. Gen. 555, 557. Bidders have not been able to contest the award of contracts as bidders or in their capacity as citizens generally. O'Brien *v.* Carney, 6 Fed. Supp. 761; B. F. Cummings *v.* Burleson, 40 Appellate D. C. 500; Champion C. P. Co. *v.*

Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.[15] Acting through its agents as it must of necessity, the Government may for the purpose of keeping its own house in order lay down guide posts by which its agents are to proceed in the procurement of supplies, and which create duties to the Government alone. It has done so in the Public Contracts Act. That Act does not depart from but instead embodies the traditional principle of leaving purchases necessary to the operation of our Government to administration by the executive branch of Government, with adequate range of discretion free from vexatious and dilatory restraints at the suits of prospective or potential sellers. It was not intended to be a bestowal of litigable rights upon those desirous of selling to the Government; it is a self-imposed restraint for violation of which the Government—but not private litigants—can complain. Thus, a wage determination by the Secretary contemplates no controversy between parties and no fixing of private rights; the process of arriving at a wage determination contains no semblance of these elements which go to make up a litigable controversy as our law knows the concept.[16] Courts have never reviewed or supervised the administration of such an executive responsibility even where executive duties "require an interpretation of the law."[17] Judicial restraint of those who administer the Government's purchasing would constitute a break with settled judicial practice and a departure into fields hitherto wisely and happily apportioned by the genius of our polity to the administration of another branch of Government.

This Act's purpose was to impose obligations upon those favored with Government business and to obviate the possibility that any

Joint Committee on Printing, 47 Appellate D. C. 141; cf. Strong v. United States, 6 Court of Claims 135. And the view that bidders have no standing in the courts has been generally recognized by the Comptroller General, the Inter-Departmental Board on Contracts of the Bureau of the Budget as well as the Senate Judiciary Committee. Hearing before the Comm. on the Judiciary, House of Representatives, 71st Cong., 2nd Sess., on H. R. 5568, Serial 4, Part 1, pp. 16-22, 26-27; Senate Report 433, 74th Cong., 1st Sess.

[15] Atkin v. Kansas, 191 U. S. 207; Ellis v. United States, 206 U. S. 246; Heim v. McCall, 239 U. S. 175; cf. Federal Trade Commission v. Raymond Co., 263 U. S. 565.

[16] Norwegian Nitrogen Co. v. United States, 288 U. S. 294, 319, 320.

[17] United States *ex rel.* Dunlap v. Black, 128 U. S. 40, 48; cf. Butte, A. & P. Ry. v. United States, 290 U. S. 127, 136, 142, 143.

part of our tremendous national expenditures would go to forces tending to depress wages and purchasing power and offending fair social standards of employment. As stated in the Report of the House Committee on the Judiciary on the Bill,[18] "The object of the bill is to require persons having contracts with the Government to conform to certain labor conditions in the performance of the contracts and thus to eliminate the practice under which the Government is compelled to deal with sweat shops."

We find nothing in the Act indicating any intention to abandon a principle acted upon since the Nation's founding under which the legislative and executive departments have exercised complete and final authority to enter into contracts for Government purchases. The Committee Hearings and Reports and the construction of the measure by its sponsors disclose no purpose to invoke judicial supervision over agents chosen by Congress to perform these duties. And Sections 4 and 5 do not subject a wage determination to such review. Provision for hearings and findings by the Secretary with respect to decisions upon breaches of stipulations by contractors, once purchases have been made, is indicative of a lack of intention to create any rights for prospective bidders before a purchase is concluded.

The Act does not represent an exercise by Congress of regulatory power over private business or employment.[19] In this legislation Congress did no more than instruct its agents who were selected and granted final authority to fix the terms and conditions under which the Government will permit goods to be sold to it. The Secretary of Labor is under a duty to observe those instructions just as a purchasing agent of a private corporation must observe those of his principal. In both instances prospective bidders for contracts derive no enforceable rights against the agent for an erroneous interpretation of the principal's authorization. For erroneous construction of his instructions, given for the sole benefit of the principal, the agent is responsible to his principal alone because his misconstruction violates no duty he owes to any but his principal. The Secretary's responsibility is to superior executive and legislative authority. Respondents have no standing in court to enforce that responsibility or to represent the public's interest in the Sec-

[18] House Report No. 2946, 74th Cong., 2nd Sess.

[19] Cf. Ex parte Williams, 277 U. S. 269, 272; Great Northern Ry. Co. v. United States, 277 U. S. 172, 180.

retary's compliance with the Act.[20] That respondents sought to vindicate such a public right or interest is made apparent both by their prayer that the determination be suspended as to the entire steel industry and by the extent of the injunction granted.

The contested action of the restrained officials did not invade private rights in a manner amounting to a tortious violation. On the contrary, respondents in effect seek through judicial action to interfere with the manner in which the Government may dispatch its own internal affairs. And in attempted support of the injunction granted they cite many cases involving contested Government regulation of the conduct of private business.[21] Their cited cases, however, all relate to problems different from those inherent in the imposition of judicial restraint upon agents engaged in the purchase of the Government's own supplies.

The Government can supply its needs by its own manufacturing or by purchase. And Congress can as it always has, either do the purchasing of the Government's goods and supplies itself, or it can entrust its agents with final power to do so and make these agents responsible only to it.[22] Courts should not, where Congress has not done so, subject purchasing agencies of Government to the delays necessarily incident to judicial scrutiny at the instance of potential sellers, which would be contrary to traditional governmental practice and would create a new concept of judicial controversies. A like restraint applied to purchasing by private business would be widely condemned as an intolerable business handicap. It is, as both Congress and the courts have always recognized, essential to the even and expeditious functioning of Government that the administration of the purchasing machinery be unhampered. The Constitution prohibits appropriations for the Army for more than

[20] Cf. General Inv. Co. v. N. Y. Cent. R. R., 271 U. S. 228, 230. See also Note 10.

[21] See, e. g., Utah Fuel Co. v. Coal Comm'n, 305 U. S. 56, 58; Shields v. Utah Idaho Central Railroad Co., 305 U. S. 177; Waite v. Macy, 246 U. S. 606; American School of Magnetic Healing v. McAnnulty, 187 U. S. 94; Gegiow v. Uhl, 239 U. S. 3; Truax v. Raich, 239 U. S. 33; Pierce v. Society of Sisters, 268 U. S. 510.

[22] Great Northern Railway Co. v. United States, 277 U. S. 172, 182; Work v. Rives, 267 U. S. 175; Butte, Anaconda & Pacific Ry. Co. v. United States, 290 U. S. 127; United States v. Babcock, 250 U. S. 328; Louisiana v. McAdoo, 234 U. S. 627; Adams v. Nagle, 303 U. S. 532, 540-1.

two years,[23] and by statute contracts for the purchase of Departmental supplies are in general limited to one year.[24] These prohibitions emphasize the grave importance of leaving the restraint of the Government's purchasing agents to Congress and their executive superiors.

The record here discloses the "confusion and disorder"[25] that can result from the delays necessarily incident to judicial supervision of administrative procedure developed to meet present day needs of Government and capable of operating efficiently and fairly to both private and public interests. In the appropriate words of Mr. Justice Sutherland, "The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the conclusion which we have reached, that a suit of this character cannot be maintained."[26] For more than a year, Cabinet officers and their subordinates have been enjoined from making the Secretary's determination of minimum wages effective. Meanwhile, iron and steel were needed for the Army and Navy. In order that the military program could proceed, the declared policy of the Congress was abandoned under judicial compulsion and contracts without a minimum wage stipulation have been awarded for more than $65,000,000.00 worth of iron and steel products since the injunction issued.[27] If the general law permits prospective bidders to challenge each wage determination of the Secretary in the courts, by a like token all employees affected could obtain judicial review. Such a possibility places in bold relief those conditions which led Congress to proceed in this Act upon the belief, to which we have recently alluded,[28] that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."[29]

The case before us makes it fitting to remember that "The interference of the Courts with the performance of the ordinary duties of the executive departments of the Government, would be produc-

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[23] Art. I, Sec. 8, cl. 12.

[24] 41 U. S. C. 13.

[25] Cf. Mr. Chief Justice Taney in Decatur *v.* Paulding, 14 Pet. 497, 516.

[26] Mass. *v.* Mellon, 262 U. S. 447, 487.

[27] Bulletins Nos. 75 to 176, inclusive, of the Division of Public Contracts of the Department of Labor.

[28] Federal Communications Commission *v.* Pottsville Broadcasting Co., — U. S. —, —.

[29] Missouri, Kansas & Texas Ry. Co. *v.* May, 194 U. S. 267, 270.

tive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them.''[30]

The District Court properly dismissed the bill and the Circuit Court of Appeals for the District of Columbia was in error in finding respondents with standing to bring this action, in ordering the Secretary's determination restrained and in holding respondents entitled to declaratory judgment.[31]

Our decision that the complaining companies lack standing to sue does not rest upon a mere formality. We rest it upon reasons deeply rooted in the constitutional divisions of authority in our system of Government and the impropriety of judicial interpretations of law at the instance of those who show no more than a mere possible injury to the public. The judgment of the Court of Appeals is reversed, and that of the District Court dismissing the bill is affirmed.

Reversed.

Mr. Justice McREYNOLDS is of opinion that the challenged judgment should be affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[30] Decatur *v.* Paulding, *supra*, at 516.

[31] Aetna Life Ins. Co. *v.* Haworth, 300 U. S. 227, 240-1.